No. 11,660.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JACOB S. GIMPELSON,

Appellant,

vs.

MAX KAUFMAN, doing business as the CHICAGO HOTEL AND RESTAURANT SUPPLY; and CHICAGO HOTEL, RESTAURANT AND MEAT SUPPLY, INC., a corporation,

Appellees.

BRIEF FOR APPELLANT.

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BRIEF FOR APPELLANT.

Jurisdiction.

Appellant Jacob S. Gimpelson (sometimes herein called "the veteran") appeals to this Court from a judgment of the United States District Court of the Southern District of California dismissing his petition filed against Appellees Max Kaufman, individually, and Chicago Hotel, Restaurant & Meat Supply, Inc., a corporation, for enforcement of his reemployment rights as a veteran of the armed forces under *50 U. S. C. A. App., Secs. 308 and 357.*

Jurisdiction below was based on *50 U. S. C. A. App., Sec. 308(e);* and of this Court on Judicial Code, Sec. 128(a)—First, *28 U. S. Code, Sec. 225(a)—First.*

Statutes Involved.

This case involves the construction and application of the following statutes, material portions of which are abstracted or quoted in the Appendix hereto, to wit:

(1) Sections 8 and 16(b) of the Selective Training and Service Act of 1940, as amended. *50 U. S. C. A. App., Secs. 308 and 316(b).*

(2) Section 7 of the Service Extension Act of 1941, as amended. *50 U. S. C. A. App., Sec. 357.*

(3) Sections 6, 7, 16 and 17 of the Uniform Partnership Law, as adopted in California. *California Civil Code, Secs. 2395-2462, especially Secs. 2400, 2401, 2410, 2411, and also Secs. 1427-1428.*

(4) Limited Partnership Law of California. *California Civil Code, Secs. 2477-2510, especially Secs. 2477-2478 and 2483.*

(5) California Corporation Law, especially *California Civil Code, Secs. 285-293, 308, 326-329.*

(6) California Corporate Securities Act *(Stats 1917, p. 673 et seq.),* as amended. *Deering's California General Laws (1944), Vol. 2, Act 3814, especially Secs. 2(8), 3, 16, 33.*

(7) Statute of Frauds. *Code of Civil Procedure of California, Sec. 1973a(1).*

STATEMENT OF THE CASE.

Appellant Gimpelson, an honorably discharged veteran of the armed forces, petitioned the District Court to require the two appellees (1) *to reemploy and restore* him to his former position as general manager of their meat market in Los Angeles, California, and (2) *to compensate him for his interim loss of wages* suffered by reason of their refusal to do so since January 3, 1946. [R. pp. 2-6.]

His petition averred that he left that position in Max Kaufman's employ on October 23, 1942, in order to enter upon service in the United States Army, from which he was honorably discharged on November 6, 1945; that in December, 1945, he applied for reemployment and restoration to Kaufman, and was refused; but was employed in the inferior, non-managerial position of utility man at less pay on January 3, 1946; that Kaufman's business was thereafter transferred to the appellee corporation about March 31, 1946 (actually April 1, 1946), the veteran continuing in its employ as utility man; that Kaufman has since operated the business through the corporation, of which he is the dominant officer, director and stockholder; and that the veteran was discharged without cause by Kaufman from such inferior position under the corporation on May 1, 1946. Gimpelson averred that he has always been ready, willing and able to perform the duties of his former position of manager, but has been prevented by the appellees from so doing.

The answers of the two appellees raised various defenses, the most important of which are: (a) that the veteran did not "apply for reemployment" within time, and thereby waived his rights; (b) that Max Kaufman's cir-

cumstances have so changed as to make restoration of the veteran to his former or a like position "unreasonable or impossible"; and (c) that the appellee corporation, which was first chartered January 21, 1946, has never been obligated to him under the reemployment provisions. [R. pp. 7-14.]

The case was tried without a jury on January 10, 1947, before United States District Judge Ben Harrison, who on February 17, 1947, entered findings of fact and judgment sustaining these three defenses and dismissing the petition. [R. pp. 21, 25-26.]

On May 14, 1947, Gimpelson filed his notice of appeal to this Court. [R. p. 27.] The appeal was duly perfected. On September 25, 1947, the time for filing this Brief was extended to November 26, 1947, by order of this Court, on stipulation and affidavit; and a further extension to December 26, 1947, was granted on November 21, 1947.

The facts out of which the case grew are, in brief, as follows:

From January, 1941, until October 23, 1942, Jacob S. Gimpelson was employed by Max Kaufman as manager of his wholesale and retail meat market at 925-927 Temple Street, in Los Angeles California. After March 1, 1942, Gimpelson's pay in this position was a $35 weekly salary, a flat $15 per week expense allowance, and 50% of the wholesale, and 25% of the retail, profits of the business. This profit sharing percentage yielded Gimpelson $2,500 between March 1, 1942, and October 23, 1942, or an eight-month average exceeding $300 a month. His total earnings in this eight-month period were thus in excess of $500 per month. [R. pp. 40, 55-56, 93, 103.]

Gimpelson left this position on October 23, 1942, to be inducted into the U. S. Army under the draft. He was honorably discharged from the Army November 6, 1945; applied to Kaufman for reemployment on December 10,

1946; and was refused immediate restoration as manager. [R. pp. 3, 23, 25, 35, 41-43, 60, 71-72, 122-123.] On January 3, 1946, Kaufman put him to work as a utility man, or "handy boy"—so-called by Kaufman—at $40 per week straight salary, without profit sharing; and he worked in that inferior position from then until Kaufman transferred the business to the appellee corporation on April 1, 1946. Thereafter he continued in the same inferior capacity under the corporation until May 1, 1946, when he was discharged by Kaufman for failing to buy stock in the corporation, and because the veteran was complaining of his inferior position, wage and work. [R. pp. 123-124, 46-48, 66, 68-71.]

In 1942, Max Kaufman also owned another market on Fairfax Avenue, in Los Angeles, and operated it under a different manager. During Gimpelson's military absence, Kaufman sold this Fairfax market. However, his health was not good, and he continued to need, and to employ, a manager for his Temple Street business. Morris Kaufman, Max Kaufman's brother, held this position under Kaufman when the veteran applied for reemployment, and he continues to hold it under the corporation. [R. pp. 66, 120, 136, 141-142.]

In the month of November, 1945, there had been initiated, and on December 10, 1945, and from then until April 1, 1946, there was pending between Max Kaufman and two of his brothers, to wit, the said Morris, and Joseph Kaufman of Chicago, a plan to incorporate, move and expand his Temple Street business, in a new location, with additional capital in an unspecified amount (ultimately fixed at about $26,000) to be supplied by said two brothers, who were to be stockholders in the corporation. The company was to be headed by Max Kaufman, as president, owning 40% of its stock, with the remaining 60% divided equally between his two brothers; and was to use as its

name "Chicago Hotel, Restaurant & Meat Supply, Inc.," duplicating the fictitious name in which the Temple Street business of Max Kaufman was conducted, to wit, "Chicago Hotel and Restaurant Supply." [R. pp. 2, 7, 11, 37, 102, 132-133.]

There is no allegation nor proof in the record that the restoration of Gimpelson as manager of the Temple Street business would have interrupted or slowed this projected plan of incorporation and expansion. However, it is a fair inference that Morris Kaufman, the then manager, did not approve it, and that Max Kaufman did not wish to run counter to Morris' wishes. In any event, it is the veteran's contention that there is no actual proof whatever that it was "impossible or unreasonable" for Max Kaufman to restore him properly, within the meaning of Section 8(b)(B) of the Selective Training and Service Act.

There was a delay in incorporating and transferring the business. The corporation was not chartered until January 21, 1946; and it did not take over the business from Max Kaufman until April 1, 1946. [R. pp. 3, 24, 48, 99-100, 109, 142-145.] Meantime, Max Kaufman continued to remain the *sole owner and operator* of the business; and from January 1, 1946, until April 1, 1946, he made $9,295.47 profits therefrom, of which about $7,265 was from the wholesale and about $2,000 from the retail branches. If the veteran had been reemployed January 3, 1946, in his former position, his percentage of this profit would have been $4,131.

Prior to April 1, 1946, Max Kaufman's two brothers had advanced $11,000 toward their "subscriptions"; and on or about April 1, 1946, they found that, by reason of

an interim increase in the Kaufman inventory (showing the $9,295.47 profit aforesaid), their proportionate participation would require them to contribute more than they expected for their 60% of the stock; and they argued with Max Kaufman that, as there had been a delay in incorporation and transfer, they should "share the interim profits," *i. e.,* should be credited with their "corporation share" of his $9,295.47 profits, in diminution *pro tanto* of the money expected from them. Max Kaufman agreed to this; and they were credited with 60% of this profit as a "contribution." They then paid the remaining $15,000 of their subscriptions, thus arrived at; and the books of the company were so set up, officers elected, and the business transferred. [R. pp. 104-110.]

On December 10, 1945, apparently to prevent being inconvenienced by the veteran's application, Max Kaufman had explained to him the status of the incorporation plan; and requested him to "work with Morris" in an inferior capacity for a time; and led him to believe that, "in about two weeks," *i. e.,* upon the return of Joseph Kaufman from Chicago, at which time it was expected that the corporation would be formed, an appropriate and more suitable place would be provided him in the business. [R. pp. 71-78, 99-100, 109-110, 132-133, 139.] But no better place has ever been offered to him, and he was discharged May 1, 1946, as aforesaid, upon renewing his protests at the delay, and the inferior work, position and pay. [R. pp. 46-48, 66, 68-71, 123-124.]

The difference between the veteran's 1942 $500 per month earnings as manager, and his $175 per month salary as "handy boy," is in excess of $325 per month;

and, as stated above, he lost $4,000 in profit sharing in January 1-April 1, 1946, or $1,350 per month during said three months.

The appellees concede that he was not guilty of laches in bringing this suit. [R. p. 77.]

Appellant's Theory.

Appellant contends: That the pendency of the plan to incorporate his business in future did not relieve Max Kaufman of his duty to restore the veteran as manager; that the veteran's application made this duty a matured business obligation, upon which the subsequent organization of, and taking over by, the corporation had no more effect than it did on *any other* business obligation of Max Kaufman. That the corporation, upon taking over the business, became bound with him to this obligation, since all the promoters and stockholders had knowledge of the obligation; and that the subsequent actions of both appelees toward the veteran were and are unlawful. That there is no proof that his brothers were ever "partners" of Max Kaufman, but that if they were, this did not affect the veteran's rights. That the District Court should at least have awarded the veteran $4,000 as his loss of wages to April 1, 1946, against Max Kaufman; and at most, should have ordered him restored as manager for 12 months, against both appellees, together with all interim loss of compensation or wages.

Questions Involved.

The following questions are thus presented by this appeal:

1. Whether the veteran "made application for reemployment" within 90 days after his discharge from the Army, within the meaning of Section 8(b), *supra.*

2. Whether the pendency of the future plan of Max Kaufman to incorporate, move and expand his business was such "a change in his circumstances" as to "make it impossible or unreasonable" for him to restore the veteran as manager on January 3, 1946.

3. Whether by incorporating the business, on April 1, 1946, with his brothers as stockholders, Max Kaufman could, or did, relieve himself of his statutory obligation to restore the veteran.

4. Whether the corporation, as Kaufman's successor, became bound by Kaufman's obligation under the reemployment provisions.

5. Whether there was any substantial evidence to support the District Court's findings that Kaufman's business was "run as a partnership" prior to April 1, 1946, and that "in January, 1946, respondent Kaufman neither owned nor controlled the business." [R. p. 24.]

6. Whether there is any substantial evidence to support the District Court's findings that the veteran "accepted" the inferior position at less wages "without objection after a full explanation of the changed circumstances," or its finding that money contributed by Kaufman's brothers in the reorganization "has increased the capital investment of the corporation to approximately three times the value of Kaufman's former business." [R. pp. 24-25.]

7. Whether either of these findings in Questions 5 or 6, *supra,* was actually material, or had any effect on the veteran's reemployment rights.

8. What relief in equity should have been awarded the veteran, and against which of the two appellees should it have been adjudged.

SPECIFICATION OF ERRORS.

I.

There was no substantial evidence to support, and the District Court erred in making, any of the following findings of fact or conclusions of law, to wit:

1. That appellant did not make application for reemployment in his former position or in a position of like seniority, status and pay, within the meaning of Section 8(b) of the Selective Training and Service Act of 1940, as amended, within 90 days following his discharge from the United States Army. [Finding X, Conclusion 2, Opinion par. 1, R. pp. 21, 25. *Cf.* Evidence, R. pp. 41-43, 60, 65, 68, 71-72, 122-124, and Court's comments, R. pp. 84-85.]

2. That the circumstances of Max Kaufman had so changed at the time of appellant's application as to make it impossible or unreasonable for him to reemploy and restore him to his former position, or to a position of like seniority, status and pay, within the meaning of Section 8(b)(B) of said Act. [Finding IX, Conclusion 3, Opinion par. 2, R. pp. 21, 24-25. *Cf.* Evidence, R. pp. 91, 99-110, 113-115, 131-133, 138-139, 142-145, 41-49, 60-63, 72, 76.]

3. That the appellee corporation, as the successor in business of Max Kaufman, was without obligation to the appellant under said section of said Act. [Finding VIII, Conclusion 4, R. pp. 24-25. *Cf.* Evidence, R. pp. 41-49, 61-66, 100-101, 103-106, 109, 113-115, 121-122, 131-133, 134-136, 138-139, 142-145.]

4. That Max Kaufman's business was run "as a partnership" between December, 1945, and April 1, 1946. [Same citations as under No. 3, *supra.*]

5. That there was an agreement between appellee Max Kaufman and his brothers that his said business "would be run as a partnership" between December, 1945, and April 1, 1946. [Same citations as under No. 3, *supra,* especially Evidence, R. pp. 91, 103-104, 108-110 and 142-145.]

6. That the additional monies supplied by Max Kaufman's brothers "has increased the capital investment of the corporation to approximately three times the value of Kaufman's former business." [There is no proof, nor any inference to support this finding which is set out in Finding VIII, R. p. 24.]

7. That appellant accepted the inferior position in which he was reemployed "without objection after a full explanation of the changed circumstances." [Finding IX, R. pp. 24-25. *Cf.* R. pp. 48-49, 65, 68, 72, 84-85, 123-124, 141-142.]

8. That in January, 1946, Max Kaufman neither owned nor controlled the business where petitioner was formerly employed; and that the appellant was employed in the business under the "new ownership" in January, 1946, and on April 1, 1946, by respondent corporation, in a position different from the one held by petitioner on October 23, 1942. [Finding IX, Conclusion 3, R. pp. 24-25. *Cf.* Evidence cited under No. 2 and No. 3, *supra.*]

II.

The clear weight of evidence was, and the District Court should have found that:

1. The appellant on October 23, 1942, left a position, other than a temporary position in the employ of the appellee Kaufman, as manager of Kaufman's wholesale and retail meat business; that his rate of pay was $35 per week salary and $15 per week expense allowance, plus 50% of the profits of the wholesale meat business and 25% of the profits of the retail meat business computed monthly; and that appellant left such position in order to perform training and service in the United States Army under the requirements of the Selective Training and Service Act of 1940. [R. pp. 4, 23, 37-38, 51-52, 58-60, 92-93, 103, 118-119.]

2. That the appellant was honorably discharged from the United States Army on November 6, 1945, and in December, 1945, applied to appellee Max Kaufman for reemployment, and was then and at all times thereafter, and is now still qualified to perform the duties of his former position. [R. pp. 3, 23, 25, 41-43, 60, 71-72, 122-123.]

3. That at the time of such application, appellee Kaufman had an arrangement with two of his brothers under which, at a future unspecified date, it was planned to incorporate and expand his meat business; but the charter for said corporation was not issued until January 21, 1946, and it did not take over the business, and Max Kaufman remained in sole ownership and charge thereof, until April 1,

1946; and in the three months January-March, 1946, said business made Kaufman $9,295.47 profits, of which appellant's share would have been about $4,131 at his former rate of profit-sharing, if he had been reemployed as manager. [R. pp. 3-5, 24, 60-63, 99-102, 104-106, 108-110, 121, 132-133, 135-137, 139. 142-145.]

4. That the circumstances of Max Kaufman had not so changed, either beforehand, or at any time between December, 1945, and April 1, 1946, as to make it impossible or unreasonable for him to restore appellant to his former position or to a position of like seniority, status and pay; and that he unlawfully refused to do so from January 3, 1946, to April 1, 1946. [Citations just above, under No. 3.]

5. That the appellant accepted employment by Kaufman in the inferior position of handyman, at a straight salary of $40 per week, on January 3, 1946, relying upon Kaufman's representation to him that when the corporation was formed appellant would be "taken care of"; and that appellant did not then, or later, accept such inferior position as a fulfillment of appellees' obligations under the reemployment provisions. That the corporation continued appellant's employment in such inferior position, at a pay rate of $55 per week, for two weeks after it took over the business on April 1, 1946; that the corporation took over the business intact, knew of Kaufman's reemployment obligation to appellant and was and is itself bound to him thereby. [R. pp. 3-5, 42-45, 48-49, 64, 67, 72, 123.]

6. That after April 1, 1946, while each was able and obligated to do so, both appellees failed and refused to restore appellant to his former position, or to a position of like seniority, status and pay, in violation of law, and of Kaufman's agreement so to do. R. pp. 5, 42-48, 66, 68-70, 78, 121-126, 133, 141-142.]

7. That appellant is entitled to be restored to his former position, or a position of like seniority, status and pay in the employ of appellee corporation and to be compensated for his interim loss of wages and benefits by appellee Max Kaufman in the sum of $4,131 up to April 1, 1946, and thereafter by both appellees until appellant shall be restored. [R. pp. 6. 37-38, 42-49, 58-60, 93, 102-106, 108-110, 118-119.]

III.

The District Court erred in failing to adjudge and decree that appellant was entitled by law on January 3, 1946, to be restored to his former position as manager of the appellees' meat business, at his former rate of pay, and is now so entitled; and in failing to order the appellees to restore him thereto, or to a position of like seniority, status and pay, and to compensate him for the loss of wages specified in Specification II(3, 7), *supra*. (50 U. S. C. A. App., Secs. 308(b)(B) and 308(e).)

IV.

The District Court's judgment dismissing the petition should be reversed and appropriate relief here administered, or ordered on remand.

THE FACTS.*

In General.

(1) In 1936, appellant Jacob S. Gimpelson, then 22 years old, came to Los Angeles, California, from the East to work for Max Kaufman in the latter's meat business. Kaufman was the husband of a sister of Gimpelson's father. Gimpelson is not related to Joseph or Morris Kaufman. [R. pp. 38, 48, 50.]

(2) Joseph Kaufman was in the gasoline business for himself in Chicago, Illinois. [R. pp. 101, 121, 134.] Morris Kaufman operated a retail store of his own at Wilshire and La Brea Boulevards in Los Angeles. Some years before he had been a partner in business with Max Kaufman. [R. pp. 41, 74, 121.]

(3) From 1936 until April 1, 1942, Max Kaufman owned and operated a wholesale and retail meat market at 925-927 West Temple Street in the fictitious name "Chicago Hotel and Restaurant Supply," the wholesale branch being at 925 and the retail at 927 West Temple. [R. p. 37.] The business employed two outside salesmen using automobiles (one for the west side, one for the mid-town area), truck drivers, butchers, handy boys, etc. [R. pp. 39, 80-83.]

(4) Gimpelson worked in this market for seven years (1936-1942), until he was drafted into military service. He made a very good employee, as evidenced by Max Kaufman's 1944 letter of recommendation, and Kaufman expressed desire to keep him in his employ, even after his return from the war. [Exhibit No. 2, R. pp. 20, 42-45, 73-74, 123-124, 128-130.]

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*To save later repetition, a digest of all the evidence, divided into factual propositions, and by numbered paragraphs, is here given.

(5) Gimpelson had worked as "handy boy" or utility man, meat cutter, deliveryman, outside salesman and meat buyer [R. pp. 57, 59], and in the words of Max Kaufman's letter, was "thoroughly capable in handling any jobbing or retail meat problem which may arise." [R. p. 20.]

(6) In the latter part of 1940, Gimpelson went to New York to visit his family; and in *January, 1941,* upon his return to Los Angeles, he *was made general manager* of the Temple Street wholesale and retail meat market by Kaufman. [R. pp. 37-38, 80-83.] Thereafter, in association with Kaufman, he supervised the operation of the place, purchased all shop supplies, bought most of the meats (Kaufman buying the rest), selected and directed the work of the employees, fixed the sale price of meats, and supervised the outside salesmen.

(7) About this time, Morris Kaufman, whose business at Wilshire and La Brea had closed, was employed by, and worked under, Gimpelson in the Temple Street market. [R. pp. 41, 49, 74.]

(8) Notwithstanding his duties and responsibilities as manager, after January, 1941, Gimpelson's pay, until March 1, 1942, was meager. Thus, from January, 1941, when he became general manager, until October 8, 1941 (a year before his military service began), his wage was only $17 per week, plus $8 per week expense allowance. From October 8, 1941, until March, 1942, his wage was only $25 per week, plus $8 per week expense allowance. [R. pp. 52-53, 92.] There were some bonuses given to all employees, of inconsequential size, which he also shared. [R. pp. 54-55.]

(9) On March 1, 1942, a *new compensation agreement* was entered into *between Gimpelson and Kaufman.* Under this, Gimpelson was to receive a salary of $35 weekly, a $15 per week expense allowance, plus 50% of the profits

of the wholesale business and 25% of the profits of the retail business done at the market. [R. pp. 4, 12-13, 37-38, 51-52, 58-60, 93, 118-119.] Monthly profit and loss statements were prepared, from which Gimpelson's share could be computed, though he did not draw them monthly.

(10) This profit sharing agreement netted Gimpelson $2,500, in addition to his $50 per week salary and allowance, during the eight months between March 1, 1942, and his induction on October 23, 1942. His monthly earnings were thus over $500. His $2,500 share in the profits was settled at the time of his departure for military service, at an accounting participated in by Gimpelson, Kaufman and William E. Asimow, Kaufman's accountant. [R. pp. 40. 55-56, 92, 103.] For this accounting, Mr. Asimow had compiled some profit and loss statements [Petitioner's Exhibit No. 1, R. pp. 15-19], and these were used in computing and adjusting the amount then due Gimpelson. [R. pp. 117-118.] Exhibit No. 1 shows that during this eight months' period, March-October, 1942, the net profits of the wholesale business totaled $4,147.65, of which Gimpelson's 50% would have been $2,073.83, and the retail net profits $3,192.66, of which Gimpelson's 25% would have been $798.16; and that Gimpelson's share of both would thus have been $2,871.99. However, in adjustment and settlement, the parties agreed to a reduction in view of depreciation, and in view of the fact that Kaufman had received no salary, while Gimpelson had. [R. p. 103.] They settled Gimpelson's share at the round figure $2,500. Of this amount, $1,500 was paid him in cash at that time. The other $1,000 was left "in the business," at Kaufman's suggestion, because "the finances of the business were not too strong." At Gimpelson's direction this $1,000 was paid in installments to his mother after his departure. [R. pp. 79, 93, 55-56.]

(11) Gimpelson and Kaufman parted very good friends, and there can be no reasonable dispute about the fact that the profit-sharing arrangement was intended when made, and until after Gimpelson's departure was, for an indefinite future period, i. e., there can be no dispute that it was *"other than temporary"* within the meaning of Section 8 of the Act, notwithstanding the defense argument on that point.

(12) Thus, Gimpelson [R. pp. 58-60] testified why it was made, and for how long it was to be effective, as follows:

> Q. By Mr. Mellinkoff: Did you have any agreement with Mr. Kaufman, Gimpelson, before the war as to how long this percentage arrangement was to run? A. No agreement, sir. I assumed it was to go indefinitely.
>
> The Court: It isn't a question of what you assumed. Was there an agreement?
>
> The Witness: No, sir.
>
> Q. By Mr. Mellinkoff: Was there anything in writing? A. No, sir.
>
> The Court: Let us find out when this new arrangement was made. You said in March.
>
> The Witness: Yes, sir.
>
> The Court: Before you went into the service?
>
> The Witness: Yes, sir.
>
> The Court: What were you doing prior to that?
>
> The Witness: The same thing I was doing after March.
>
> The Court: Well, what was the occasion of the change in your arrangement at that time?
>
> The Witness: This goes back to what I started to say, in 1940—
>
> The Court: I do not want to go back to 1940. You had, as I understand, an arrangement for a

percentage of the profits. What brought that about? What brought the change at that time?

The Witness: I had been working very hard in the place. I had been selling, I had been buying, I had been cutting meat. I had been delivering orders.

The business had not been very solvent. Mr. Kaufman owed the packing houses for several weeks meat bills. We had not very good equipment. Mr. Kaufman said that if I would bear with him and work at that low salary, work with him until we had money in the bank, until the business was established solidly then he would give me whatever I wanted from the business. He led me to believe that the business would some day be mine. He told me so in these words. He said he had two children. He had a son who was studying to be a doctor and he had a daughter who was married to a big shot in the Philippines and that neither one of them needed the business; that I was the only one in the family who had ever done him any good in the business or who had an interest in the business, and he said if I bore with him, worked with him in the business at that low salary until the business was solid, then he would take care of me when the business was solid. He told me that I was to receive $25 a week salary and a 7 per cent commission on all the business which I did. He never gave me that 7 per cent commission. In lieu of that he said, after I had earned—worked there a long time, he said that he would give me whatever I wanted when the business was solid.

In the beginning of 1942 the business was solid and I talked with him and we derived at this profit-sharing arrangement at that time.

The Court: Proceed. [R. pp. 58-60.]

(Note: The $25 salary mentioned above began October 8, 1941 [R. p. 53].)

(13) William E. Asimow, Kaufman's employee, accountant and counsellor ever since 1929 [R. p. 91], testified for appellees concerning the 1942 accounting [R. p. 93], as follows:

> Q. Was there any statement made at that time by either party to the effect that this arrangement was one that was to continue? A. You are asking me to state my opinion?
>
> The Court: Not your opinion. What was said?
>
> The Witness: Well, as I recall it, after the amount had been agreed upon between the parties, Kaufman drew a check or had me draw a check for $1,500.00, and Jack agreed to accept the balance in weekly payments to his mother. They shook hands on the deal and they seemed to be very friendly at the time. I don't—the only understanding, I think there was between them at that time as to the future relations, was *that when Jack got out of the Army there would always be a place for him if he wanted to come back.* Under what conditions he would come back, that is, percentage-wise, there was no definite understanding as to that.
>
> The Court: There wouldn't have to be. The law fixes that. [R. p. 93.]

(14) Even Max Kaufman, interrogated by the Court, testified to the same effect, i. e., that *he did promise the share of profits claimed*, although he says it was "to make him (Gimpelson) happy." He admitted that if Gimpelson had not gone into military service, he would have continued there. [R. p. 119.]

(15) This made unanimous *all* testimony on the point that the profit sharing agreement *was made for indefinite future duration.* The District Court orally overruled the defense contention that it was "temporary" [R. pp. 51-52, 68, 95-96]; and this was manifestly correct.

(16) From 1939, or earlier, until 1943, Max Kaufman also owned and operated a retail meat market on Fairfax Avenue, in Los Angeles, under another manager. [R. pp. 39-40.] *In 1941,* due to the *then pending objections* of the City Health Department, Kaufman testified he was thinking of moving his wholesale department from Temple to Fairfax. [R. p. 119.] He did not do so, however; and in 1943, he sold the Fairfax market, due to "rationing and points." [R. pp. 83, 107, 120.]

(17) After this sale, Kaufman devoted all his time to the Temple Street market. [R. p. 120.] However, this was no novelty; for he previously "spent practically all his time on Temple Street" [R. p. 39], where, with Gimpelson, who also worked as outside salesman, downtown, he bought meat supplies and gave directions to employees. [R. pp. 20, 81, 83, 94, 40, 56-58, 128-130.] Gimpelson testified, without any contradiction:

> "He spent practically all his time on Temple Street." [R. p. 39.] "His major duties were (a manifest typographical error meaning 'at') the Fairfax market or major function was to collect or count money in the till at the end of the day, to make the deposit and to ask the manager if there was anything he needed in the way of meats, so that when he might go out to purchase meat for the wholesale, he would purchase meat for the Fairfax market too." [R. p. 40.] (Explanatory parentheses inserted.)

(18) Gimpelson was inducted into the United States Army on October 23, 1942, the same day that he terminated with Kaufman. He entered upon active duty on November 5, 1942, and was honorably discharged November 6, 1945 [R. pp. 3, 23, 35], after completing three years active duty, some of it overseas. [R. p. 42.]

(19) Harry Priester was hired by Kaufman to take Gimpelson's place, when he entered the Army. [R. p.

120.] At the time of his return, Morris Kaufman was manager of the Temple Street business. [R. pp. 141, 122-123.] The Record does not disclose when Priester left and Morris Kaufman became manager, but as there is *no evidence, and no claim,* so far as appellant's counsel has heard, that Max Kaufman was ever *without a manager* to aid him in the Temple Street business, the presumption is that Morris Kaufman succeeded Priester. [R. pp. 42, 136, 141.]

(20) Max Kaufman was afflicted with enlargement of the heart, and had been advised by his physician (his son) not to be active in business. [R. pp. 23, 121-122.] For this reason, he *needed managerial assistance* on Temple Street, and without it, he intended to retire. [R. pp. 23, 121-122.] To use his own words: "I couldn't run it any longer."

(21) Thus at the time of the veteran's return, Max Kaufman's circumstances had not so changed as to make it "impossible or unreasonable" for him to *employ some manager on Temple Street,* which in fact he did. From any viewpoint, therefore, the 1943 sale of the Fairfax market is totally immaterial. If Kaufman's circumstances had been changed thereby, they had *changed back again* before the veteran's return; and the total result was *nil.*

A. The Veteran "Made Application for Reemployment" Within Due Time; and Did Not Waive His Rights.

(22) Gimpelson testified [R. pp. 42-49, 61-72] that on December 10, 1945, he made application for reemployment to Max Kaufman; that on January 3, 1946, he was given temporary work in an inferior position, at less pay, but with a promise, *on which he relied,* that a more suitable position would be provided for him shortly; that he objected repeatedly to the delay and to the inferior work; and that he was finally discharged on May

1, 1946, after the corporation had been formed and had taken over the business on April 1, 1946. Thus he testified:

(a) That he applied for reemployment. [R. p. 41.]

(b) That:

"I got back to Los Angeles on December 8th. On December 9th I called Mr. Max Kaufman and exchanged greetings with him. On December 10th I went down to see him. I talked with Mr. Max Kaufman on December 10th. Mr. Kaufman took me in back of the building and showed me a building, a framework of a building which he was in the process of constructing.** He said that he had hoped to have that building finished for me when I got back.

"He said that—I believe this is pertinent to the case. He said that he had hoped to make a corporation when I got back and in the corporation would be a brother Joe, who he said had come in from Chicago while I was on the way back from Iwo Jima, and he said that his brother Joe had made a lot of money in the gasoline station business in Chicago and was interested in going into the meat business with him in Los Angeles.

"He said he hoped to make a corporation between the four of us, his brother Joe, Morris, myself and himself. And he said that he had hoped to use this building as the home of the corporation; that he was then in the process of purchasing a piece of property opposite the bank on Temple and Fremont, and he

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**This was a building begun by Max Kaufman on Temple Street before his brothers became interested in the incorporation negotiations, and which was later moved to the Fremont Street location after the veteran's return. It was not the new building on Fremont Street that was built by Joseph Kaufman, although it was incorporated in the improvements on Fremont Street. [R. pp. 42, 62-63, 138-139.]

was also dickering with some house movers to move this framework of a building to that property.

"Mr. Kaufman said that he hoped that when I got back to work that I would have patience with his brother, Morris Kaufman, who was then running the place.

"He said that his brother Morris had carried the load while I was in the service. His brother Morris had been working very hard, was nervous and excitable and that if I would have patience with him he would make everything right. That Joe knew how to handle Morris; when Joe come in from Chicago, come into the business, that Joe could handle Morris very well and everybody would be happy. . . .

"Then he told me that if I went back there I would find that it was much easier to do business now; that it was not necessary to cater to customers and that if I would just work with Morris for a while until Joe come back and did whatever was necessary for the business that he would smooth out any difficulties when Joe come back." [R. pp. 42-43.]

That all this conversation occurred on December 10, 1945; and that he did not go to work immediately. That—

"I told Mr. Kaufman that I needed an automobile and a place to live and I would appreciate some time to find both.

"He went with me to Cook Brothers to try to get an automobile. He did not offer to help me to find a place to live. I found a place to live. I got sick. I was sick for approximately two weeks. The first time in my life I was sick, and then after I recovered from the flu I went back. This was before the holidays.

"I saw Mr. Kaufman. He suggested that I go to work after the New Years; that things would be all mixed up and Morris was excited as it was, and it would be better if I went to work after the New Years.

"I went to work on January 3rd of 1946." [R. pp. 43-44.]

"I didn't ask Mr. Kaufman how much money I was getting but Mr. Kaufman on pay-day called me into the office and said that he knew I didn't care about the hours or the actual compensation and that if he gave me $40 a week it would keep Morris happy and that he would make it up to me when Joe came back." [R. p. 44.]

(c) That he went to work and continued to work under this promise. [R. p. 44.] That—

"I was working as a general flunky around the place. Just doing whatever was told me to do—boning meat, scraping the blocks, washing down the walls, hanging meat in the icebox, cutting meat."

That this was not the type of work he did before his entry into military service; but that he continued at it until about April 10th, 1946. [R. p. 44.]

(d) That—

"Mr. Kaufman told me that he would make everything right when Joe came back—Joe Kaufman came back from Chicago, I would say, sometime in February, the early part of February. At that time, Mr. Kaufman showed no inclination of making anything right. I asked Mr. Kaufman repeatedly if he couldn't use me—couldn't use my abilities to better advantage than doing the type of work I was doing, and he kept stalling me and telling me he would make things

right when Joe came back. When Joe came back there was no sign of making things right. They still kept me doing that work and Mr. Kaufman said, 'There is nothing to talk about now'; that before the corporation was formed he would take care of me and everything would be all right; that there was no point in talking about things now." [R. p. 45.]

(e) That the formation of the corporation, and the taking over of the business by it, was simultaneously announced on April 1st, 1946; and that his (the veteran's) pay for that week was split in two, as of that date, between Max Kaufman and the corporation. [R. pp. 45-46.] That—

"Mr. Kaufman (told us the corporation had been formed) on April 1st and he said, 'Well boys,' and he put his hands here, he says, 'today is April Fool's Day but don't let yourselves be fooled. I am president of the corporation,' looking right at me when he said that. That is when I learned that the corporation had been formed." [R. p. 45.]

"Well, on April 1st (or 10th) approximately, Mr. Kaufman took me down to his attorney and I talked with Mr. Kaufman at his attorney's, in Mr. Mellinkoff's office, and they suggested to me that it was—I told them that I believed that I had certain rights to my old job, to my seniority, status and pay that I had enjoyed previous to going into the service. Mr. Mellinkoff and Mr. Kaufman told me they felt that things could be worked out in the corporation; that I should take a vacation for a couple of weeks; that he would give me $200 for a vacation and that when I came back we would have a meeting in Mr. Mellinkoff's office, and Mr. Kaufman instructed Mr. Mellinkoff to talk in my behalf as regards that—my

place in the corporation, what I could expect from the corporation and what the corporation could expect from me." [R. p. 46.]

That he took the $200 and went on a vacation for two weeks, and returned just before May 1st, 1946 [R. pp. 46-47], but did not go back to work, because—

"I went back and saw Mr. Kaufman and Mr. Kaufman asked me if I had found a business yet. I told him I hadn't looked for a business, and he suggested that I buy a house. He said, 'Any kind of a house.' He said that I rent out rooms in that house. 'There is lots of money to be made in that.' I told him I wasn't interested in that; that I was interested in the meat business and I asked him if he had made an appointment with Mr. Mellinkoff and his brother(s) so that we might all get together and talk over my place in the corporation and what the corporation could expect from me, and he told me that he had not; that he had nothing to talk to me about the corporation." [R. p. 47.]

"He said that if I wanted to have patience and wait until he got his sausage factory built he would have a job for me in selling sausage." [R. p. 47.]

That he (Gimpelson) asked to go back to work in the Temple Street business, and that—

"I told him that I felt I was entitled to have my old job back and he said that, 'We are getting along very well without you and there is no reason why you should come back. We don't need a business man to run a meat business now. Anybody that has got meat is king and I am going to have meat,' and he said, 'If you want to buy some shares of stock in the corporation I will talk it over with my brothers and see if you fit in.'

"I said I didn't want to buy it. I said that I didn't think I would have to buy shares of stock to get my old job back." [R. pp. 47-48.]

That he was thus discharged, and could not have continued his employment after this date. [R. p. 66.]

(f) On cross-examination by Mr. Mellinkoff, the veteran testified that at the time of the advancement of the $200 for a vacation—

"You and Mr. Kaufman told me that Mr. Kaufman and his brothers were intending to have a big business; and that they were figuring on having me in that business; that from a long range viewpoint, I should be interested in staying with that business because there was a need for that type of business in Los Angeles. That Mr. Kaufman thought that I was a very good man and that he wanted me in that corporation and that he knew there wasn't enough work there for my abilities at the present time. This is what Mr. Kaufman said. And, that when the sausage factory was built that there would be plenty of work for me as a sausage salesman, or in charge of the sausage department. And, I told you and Mr. Kaufman that I didn't know anything about the sausage business; that I was a manager of a wholesale and retail meat business." [R. p. 67.]

That when that conversation broke up—

"The understanding was that I would take a vacation for two weeks and during that time Mr. Kaufman would talk with his brothers and would decide where I fit into the corporation and what the corporation could expect from me, and that when I returned from the vacation that we would have a meeting in your office and you would speak in my behalf to fit me into that corporation." [R. p. 68.]

That when he returned from the vacation, he had a conversation with Max Kaufman—

> "It took place in the new building which Joe Kaufman was building and then we walked along the block to the old business, to the wholesale, and we talked in back of the wholesale . . .
>
> "Well, I asked Mr. Kaufman about my old job; if he had had a meeting with you and when I was to meet with you and his brothers, and he said that he had that—that they were getting along very well now without me; that they were making more money than they ever made with me, and that unless I chose to buy shares of stock in the corporation that they did not need me . . .
>
> "He said—I told him that I had—that I had been told by attorneys that I had legal rights as well as moral rights to have my old job back; that I hoped he would not force me to exercise my legal rights . . ."
>
> "I showed him an extract from the Selective Service law and in the extract it stated I was entitled to have my seniority, status and pay which I formerly enjoyed. And I asked Mr. Kaufman to please take it to his attorney and show it to his attorney and see if we couldn't get together to arrive at an amicable solution of this, and whether he liked it or not the relationship still existed; that it was extremely unpleasant for me to have publicity as regards our relationship and business. I asked him if he couldn't possibly work this thing out satisfactorily and he said, 'It looks like you will only be satisfied with legal means.' His words were not 'legal means.' He said, 'You will only be satisfied to turn this over to the lawyers.'" [R. pp. 69-70.]

(g) That he had made repeated objections to Max and Joseph Kaufman concerning his inferior duties and the

delay; that he had not discussed his reemployment with Morris Kaufman who had been under him when he entered the Army [R. p. 49], because "Morris Kaufman is a difficult man to talk with" [R. p. 48]; but that "in the middle of February," "about two weeks after Joseph Kaufman had come back" from Chicago [R. p. 48], which return was on February 7, 1946 [R. p. 138], he talked to Joseph Kaufman, under the following conditions—

> "Joe Kaufman had asked me what the difficulty was between Morris and myself that could not be ironed out and I told him that the difficulty could be ironed out if somebody would work on it, but nobody was attempting to work on it. 'It looks like they are just trying to aggravate the difficulty,' and I asked Joe Kaufman if he didn't know that before I went into the service I was getting 50% of the profits of the wholesale and 25% of the profits of the retail, and Joe Kaufman told me that Max had told him that I was getting 40% of the profits of the wholesale and 25% of the profits of the retail, and I told Joe that his brother Max had lied to him when he said only 40%. I suggested to Joe that we go in to see Max now and find out if I wasn't getting 50% and Joe said, 'Well, what difference does it make anyway, stuff like that?' . . .
>
> "I had asked him (Joe) if he didn't know that I was running the business before I went into the service. He said he did know that." [R. p. 49.]

Gimpelson testified that he first objected to Joseph Kaufman concerning the low $40 per week salary in the middle of February, but that before that—

> "I talked to Max Kaufman many times. I told him it was extremely difficult to work under the conditions I was working under . . . I told him rent was very high, living conditions were very high. It

was difficult for me to get along on that kind of money unless I dug into my savings." [R. p. 65.]

Q. Was anything said about the percentage deal? A. No, sir, It wasn't at that time.

Q. Nothing was said about that until after Joe came back, is that right? A. That is right.

Q. Was anything said about your position, so-called position as general manager? A. Yes sir, it was.

Q. When was something said about that? A. *About a week after I had been there.*

Q. Well, now, when you first came back was there anything said about your job as general manager? A. Wasn't said in so many words. It was said indirectly. Max Kaufman asked me to go to work and work with Morris.

Q. Did he tell you what you were going to do? A. He said that I should just work with Morris. He left it up to me to do the work that was necessary for the business. [R. pp. 65-66.]

(h) Gimpelson's final testimony on the entire subject came on cross-examination as follows [R. pp. 71-72]:

Q. Now, you have testified that up until sometime in the middle of February that nothing at all had been said in regard to this profit-sharing deal. Is that correct? A. I believe so, reasonably correct, yes sir. Let me qualify that. I was assumed if I did get my old position back—

Q. Who assumed that? A. I did. And I hoped Mr. Kaufman did.

Q. Was anything said about it? A. No sir, I don't believe it was.

The Court: As I understand your testimony it was not until about April 1st that you made any protest?

The Witness: *No sir. I made protests from the first week I had been there as to the nature of my duties and to the position which I held and had been reassured each time.*

The Court: By whom?

The Witness: By Mr. Kaufman, that first I would be given my old job back and everything would be taken care of when Joe came in; that that would take place in about two weeks. Joe didn't come in until about six weeks and I struggled along and then he said the corporation would be formed very shortly and that I would have everything I wanted before the corporation was formed. *And I struggled along like that under that promise, assuming that my old job would be given to me in a short time.*

Q. By Mr. Mellinkoff: Now wait a minute. Was anything said that you were going to get your old job back, or they were going to make a place for you? A. They said *everything would be taken care of.* They were the words he used. Those were the words used.

Q. *Those very words?* A. *Yes sir.*

Q. Was anything said that you were going to get your old job back? A. Not in those words, no sir.

Q. Very well. They did talk about putting in a sausage department?—

The Court: I have heard enough about the sausage.

Mr. Mellinkoff: Very well, your Honor. [R. pp. 71-72.]

(23) Max Kaufman's version of these events was as follows [R. pp. 122-123]:

"When Gimpelson came back I just opened my arms like a father. I explained to him every bit of it." . . .

"I said, *'Jack, I don't own this any more. It is a corporation.* Probably, the corporation will be effected maybe in a couple of weeks.' I didn't know how long it will take. And I asked my brother Morris, he is right there, how much should I—what kind of a salary I should put on for Jack because he didn't have the job what we had before and the meat line was—we couldn't get meat. It was hard to get. It was rationing. So we just got that much. So Morris said, 'He is not a butcher. He can be a handy boy. He is a good boy when he wants to be and $40 is the highest we can go.'

"So I took in Jack. I said, 'Jack, they are going to allow you only $40 from the business—*the business belongs already to the corporation.'*

My brother—we started in before January yet this is in December. 'I will give you $25 from my own pocket. *I want you to be satisfied and then we will build up the new plant. We will probably be able to give you a job that will fit you better in it,'* and with the same proposition I came to Mr. Mellinkoff." [R. pp. 122-123.]

"He was satisfied for two months. On the third month he started to fight with my brother." [R. p. 124.]

"Then it was happened. He quit once. He quit. He wants to quit. In fact, he wanted to quit two weeks before and I hold him back. *I really meant to hold him in my business.* . . ." [R. p. 124.]

Q. Then when he came back after you had paid him that $200 and he want away for a while and then he came back, then did he come in to see you? A. He did.

Q. And what conversation took place at that time? A. Not so good.

Q. Well, tell the judge what happened. A. He scared me with the OPA—that is, *my brother not making out the bills good and all.* [R. 124-125.]

(24) This mention of OPA had reference to the cross-examination of Gimpelson, as follows:

> Q. Now let me see. Do you recall anything like this being said? Do you recall that you said to Mr. Kaufman on this occasion that you are speaking of, that you knew some people down at the OPA. A. I did know people there. I don't recall ever saying it to Mr. Kaufman. I may have.
>
> Q. Do you recall something to the effect, saying something to the effect that Morris Kaufman did not know how to make the bills properly. A. I said Morris Kaufman *didn't know how to read and didn't know how to write* and insisted on making out the bills.
>
> Q. And didn't you say to Mr. Kaufman that unless he took you back that he was going to get in trouble with the OPA. A. I told him that it was extremely likely that he would.
>
> Q. That he would what? A. Get into trouble.
>
> Q. With the OPA? A. Yes, sir.
>
> Q. Unless he took you back? A. No, sir. *Unless he had the bills made out properly.* [R. pp. 70-71.]

(25) After he quit, or was discharged, on May 1, 1946, the veteran on September 13, 1946, was employed by the OPA at a salary of $3,397.20 per year, and continued in this employment under the Office of Temporary Controls. He was an employee of the OTC on the date of trial, January 10, 1947. [R. pp. 34, 74-75.]

(26) Until the trial, the veteran's total earnings were: In 1946, the pay of an army sergeant; and in 1946, a total of $720 from the appellees, of which $520 was salary and $200 vacation pay, and $810 from the OPA, or a $1,530 total for the year 1946. [R. pp. 74-75.]

B. Max Kaufman's Circumstances Have Never so Changed as to Make It "Impossible or Unreasonable," Under the Act, to Restore Gimpelson as Manager, or to a Like Position.

(27) If he made it, as he claims, Max Kaufman's statement to Gimpelson on December 10, 1945, that "I don't own this (business) any more. It is a corporation," and "the business belongs already to the corporation," was a misstatement of fact. [R. pp. 122-123.]

(28) That he knew it to be a misstatement is shown by the fact that on March 30, 1946, two days before the April 1, 1946 transfer of the business, he gave correct information when interviewed by Walter Charles Richardson, an investigator for Dun & Bradstreet, credit reporters, who had been sent to make inquiry of Kaufman on this very question, in response to a commercial query Dun & Bradstreet had received. [R. pp. 142-145.] With his report of that interview before him, Mr. Richardson testified that on March 30, 1946, Max Kaufman told him that he (Kaufman) was the *sole owner* of the business *on that date.* [R. p. 143.]

He further testified as follows:

> "No, he didn't tell me it was incorporated. He said there had been plans, but no issuance of stock at the present time . . . He told me that his two brothers were interested, were going to be officers in the corporation . . . No, he didn't tell me they had put money in." [R. pp. 143-144.]
>
> "Q. Did he tell you specifically, that he confirmed the filing of the corporation articles, but stated as yet no application had been made for issuance of stock and that *he remained the sole owner of the business?* A. That is right" . . . [R. p. 144.]

"He used the words—I asked Mr. Kaufman, I said, 'Well, Mr. Kaufman, *has this business been incorporated as of yet?*' And he said, *'No, it hasn't,'* and I said then, *'You are still the sole owner of the business?'* And he said, *'Yes, I am.'"* [R. pp. 144-145.]

"May I clarify one thing, your Honor? I went out to interview him because a questionnaire had been sent to the office asking *if this business had incorporated.* It was a commercial inquiry." [R. p. 144.]

(29) Although Max Kaufman denied making these statements to Mr. Richardson on March 30, 1946 [R. pp. 131-133], the fact remains that they were a *precisely correct statement of the then status of the business,* as repeatedly testified to by William E. Asimow, Kaufman's accountant since 1929 [R. p. 91], who said:

"It was the *sole business of Max Kaufman* with the understanding, of course, that these other parties were to participate in the profits." [R. p. 109.]

It was thus the same type of arrangement that *Gimpelson* had with Kaufman prior to his induction; yet, neither the parties, nor the Court, considered Gimpelson a *"partner."* [R. pp. 37-38, 119, 23-24.]

(30) Negotiations between Max Kaufman and his brothers Joseph and Morris, looking to the incorporation began in November, 1946 (the month of the veteran's discharge from military service), upon the arrival in Los Angeles of Joseph Kaufman of Chicago, for a visit. [R. pp. 35, 42, 101, 121, 134.]

(31) At that time, Max Kaufman was not in robust health; and the rented property in which the Temple Street business was housed had been condemned for

highway purposes by the state, and would some day have to be vacated, although not immediately. [R. p. 119.] Kaufman discussed his business problem with his brother, who had in mind selling his Chicago business and coming West. They decided to incorporate, move and expand Max's business, with money to be raised from the sale of Joseph's Chicago business. [R. pp. 135-138, 100-102.]

(32) Kaufman's problems presented no *immediate emergency.* For—

> (a) In so far as his health is concerned he still continues in active business, exactly as formerly, and at all intervening times. [R. pp. 133, 121-122.]
>
> (b) The state highway condemnation proceeding, although filed in December, 1944, had not, at the time of trial, resulted in any evictions from the property. In fact, at the time of trial, January 10, 1947, the retail market was *still operated at the same location,* with no move in sight. The wholesale market was voluntarily moved by the corporation to the new location on Fremont Street in October, 1946. [R. pp. 23, 62, 76, 97-98, 120.] The state never set any time limit upon the occupancy of the premises, so far as the record discloses.

(33) Max Kaufman, in 1945, had begun some improvements on his Temple Street property; but did not wish to finance the acquisition of a new location *with his own money.* [R. pp. 42, 62-63, 138-139.]

(34) Mr. Asimow discribed and outlined the incorporation plan, arising under these circumstances, as follows:

> "As I say, Joseph Kaufman came from back East in November, and Max approached him with the idea of putting this capital into the business *in order to*

put up a building because they could no longer continue under their present circumstances and he felt that if he—that he would rather go out of business than risk his own capital in this new venture and that if Joseph Kaufman, who was looking for a proposition at the time, was interested they would all pool their resources and *put up this building* and *incorporate it* and so share the responsibilities and the risk involved." [R. p. 101.]

(35) Max Kaufman described the plan as follows:

"After my younger brother Joe came and Morris was in the business—I used to be in business with Morris . . .

"So Joe propositioned me. He is going to *invest money to build this new place,* a sanitary place, and Morris went in with it, so we made between ourselves an agreement and they were satisfied with my leadership, not to work too hard. We should continue in this business, and I am very happy they were." [R. pp. 121-122.]

(36) Joseph Kaufman described and outlined the plan as follows:

The Court: What was your agreement? Under what circumstances did you make a deposit upon this ground? What agreement did you have with your brother Max?

The Witness: Your Honor, when I came here I found out that my brother has to go away from the business, that his place is going to be taken away by the State. He was downhearted a little bit after being in business so long in one place, so I tried to cheer him up. I said, 'Nothing is lost yet. We don't know. And I might go in with you. We will see what we can do.' And I talked it over with my

middle brother, Morris Kaufman, and then I spoke to Max again and I give him a proposition.

The Court: What proposition did you give him?

The Witness: I said, 'Max, what is the use of being downhearted and being sick about it? We will go in. We will build up a new business, and real good, going business, and we will be proud of it and I will make you proud of the business that you are in right now,' and I am trying to do that, your Honor.

The Court: Well, did you have any understanding at that time as to the shares? Did you have an understanding with reference to the 40, 30 and 30 basis?

The Witness: Not that my brother asked for it, but his accountant asked for 51 per cent.

The Court: His accountant did?

The Witness: Yes. You know a matter of routine—just conversation. So I explained to him I wouldn't give up a business in Chicago and sell out and come here to my brothers and feel that I only got a minor part in the business. I said, 'I think I am capable of taking an active part and it wouldn't be fair to all of us but it would be fair,' being that he is in the business, you should go in 30, 30 and 40.

The Court: When did you agree on that?

The Witness: That was in 1946, your Honor.

The Court: *When did you decide to incorporate?*

The Witness: *Right then and there when we went out to buy a piece of ground.* I came in when I made up my mind and I set my mind to business immediately and went went out to look up the piece of ground and I gave a personal check, deposit of $2,000 immediately. [R. pp. 135-136.]

(37) The new site selected was on Fremont Street, not very far from the Temple Street site, and a purchase

agreement was made in the name of the proposed new corporation, "Chicago Hotel, Restaurant and Meat Supply, Inc." with Joseph Kaufman making the $2,000 earnest money down payment. This land purchase deal was in escrow on December 10, 1945, when the veteran returned and applied for his job. [R. pp. 42, 99-100, 139.]

(38) Joseph Kaufman's first $2,000 was paid on December 6, 1945, and on the same day Morris Kaufman gave Max Kaufman a $5,000 check, which Max Kaufman had in his pocket uncashed when he talked to the veteran on December 10, 1945. [R. pp. 139, 140, 61, 63.]

(39) Immediately after making the $2,000 payment, Joseph Kaufman left for Chicago to dispose of his old business there; and was expected to return about the first of the year, with the balance of the money necessary to finance the enterprise, including the financing of his brother Morris' share in the business. [R. p. 137.] Joseph Kaufman was in Chicago for this purpose when the veteran made application on December 10, 1945. [R. pp. 134-139, 99, 44-45, 68.] He says he told his brothers that:

> "I will come back when I liquidate my business in Chicago and I come back. As far as money is concerned I told my brothers not to worry about it, I will finance it all the way through as much as we need for this kind of business and that he should be proud of what I had in mind about another business, manufacturing sausage." [R. p. 138.]

(40) Joseph Kaufman did not return to Los Angeles until February 7, 1946, although before that time he had sent another $4,000 for the building project. This made the sums advanced by himself and Morris Kaufman total $11,000, prior to his return. The remaining $15,000 of the $26,000 credited to the two brothers, came in on or

about April 1, 1946, and in view of this, the corporation was organized and took over on April 1, 1946, Joseph and Morris Kaufman then becoming the owners of 30% each of the stock and Max Kaufman 40%. [R. pp. 138-140, 99-100, 108-109.]

(41) They said they had agreed in November-December, 1945, that Max Kaufman was to own 40% of the corporation's stock, Joseph Kaufman 30% and Morris Kaufman 30%; but the value of Max Kaufman's business was not then determined, nor was it then determined what sums the brothers would put in. These various amounts were not settled until April 1, 1946. [R. pp. 21, 48, 73, 100, 105.]

(42) The charter for the new corporation was not filed until January 21, 1946. [R. p. 100.] On April 1, 1946, there was a final adjustment between the brothers, and proper balances struck. At the time, the corporation's books were set up and it took over the business.

(43) Mr. Asimow testified [R. pp. 99-106, 108-110, 113-114] concerning the "sharing of profits" for the pre-incorporation and pretransfer period, as follows:

> Q. Now, prior to the incorporation of the corporation do you know whether or not there was any understanding between Max Kaufman, Morris Kaufman and Joseph Kaufman as to their relationship in that business? A. At the time they first discussed the corporation in November of 1945, they agreed that as soon as the charter came through, why, they would consider themselves all members of the same business.
>
> Q. They agreed to what? A. They would consider themselves as partners, *as members of the business.* I was advised that the corporation charter had been issued January 22nd, and I was instructed to begin drawing up corporation books, *but I didn't have the time necessary to do it so I suggested that*

they work out the same basis, the corporate basis and use that as a distribution of the profits for the three months, so there would be no misunderstanding between the three of them as to who was to share in the profits the first three months *while I was preparing the records.* [R. pp. 100-101.]

Q. When were the corporate books set up? A. I was requested to set them up February 1st, but I did not set them up until April 1st.

The Court: When did the corporation take over the business?

The Witness: It would be April 1st. [R. p. 99.]

The Court: In the incorporation how were the shares divided?

The Witness: 40 per cent to Max Kaufman and 30 per cent to Joseph Kaufman and 30 per cent to Morris Kaufman.

The Court: *And the corporation took over the individual business of Max Kaufman as of April 1st?*

The Witness: *Yes, sir.*

The Court: And your report of earnings have been based on that?

The Witness: Yes, sir.

The Court: *All your accounting has been based on that?*

The Witness: *Yes, your Honor* . . . [R. p. 100.]

Q. Now, drawing your attention, Mr. Asimow, to the period between approximately the 3rd of January, 1946, and approximately, I believe, the 2nd of April 1946, can you state what the profits of Max Kaufman during that period were?

The Court: You are asking of the *individual or the business?*

Mr. Mellinkoff: Well, *both,* if your Honor please. A. The profit of the business for January 1st to March 31st, before any allocation between the respective parties, was $9,295.47.

The Court: That was for the entire business?

The Witness: Retail and wholesale.

The Court: What was the wholesale?

The Witness: At the time the business was *in a confused state as to the corporation* and we made no distinction between the two departments. In other words, records were not kept between the two departments. They were all grouped under one heading, but we estimate that the profit of the retail might be $2,000 and the profit of the wholesale would be $7,263. That is subject to inspection and correction. That is just a guess on my part *based on prior operations.* [R. p. 102.]

The Court: Let me ask you this. When this money was put into the company *did they then act as co-owners of the business* until the corporation actually took it over—until you closed the books of the business and set them up in the name of the corporation?

The Witness: *They acted in a rather managerial capacity.*

The Court: But their interest in the business was the same as in the corporation?

The Witness: That is right.

The Court: So that it was *in a sense,* until the corporation went into effect, *a partnership?*

The Witness: It was an *unofficial partnership.* It was an *interim status until the corporation could be effected.*

Mr. McCall: I object to the witness' answer as *not being qualified to answer that question* and I

would like to develop some facts so your Honor will understand what the situation was by asking this witness . . .

Mr. Mellinkoff: May it please the court, I do not think anyone is better qualified than this witness to state what the practical operation of the business was.

The Court: May I ask, was this $9,000 distributed or was it simply kept in the business?

The Witness: *It was kept in the business and was used in valuing the assets for the corporation.* It was a definite factor in the transfer of the assets to the corporation.

The Court: I know, but your statement makes it *more confusing than ever.* Those other parties invested money in the business with the understanding that it would be incorporated and the two brothers were to get a 30 per cent interest each?

The Witness: Correct.

The Court: 30 per cent of the stock, and that money went into the business before they were actually incorporated and before the corporation took over the business.

The Witness: That is right.

The Court: In the meantime, *did the other two men draw salaries?*

The Witness: *They drew salaries, yes. They were working for—well, they were connected with the business.*

The Court: When there was $9,200 approximately, in excess of their salaries in the business?

The Witness: That is right.

The Court: And that continued as a part of the assets of the corporation when you set up the books?

The Witness: No; *there was a cut-off date on April 1st, and we valued Max Kaufman's assets by a physical inventory, assigning values to them and transferred them to the corporation and he put high values on certain items and we were to take this $9,000 into consideration in evaluing those assets by that sum so that they would arrive at a fair settlement between themselves.*

They felt that the corporation should be organized when the charter was issued and the business was very profitable for the first three months and they felt they would be cheated unless they had some basis for sharing in those profits. At that time they considered themselves members of the business. At the time it was just a matter of formality that the corporation was not started until April 1st.

Q. By Mr. Mellinkoff: Mr. Asimow, I ask you this: Is there any further deduction or correction of this gross of $9,000 that you as an accountant feel should be made here? A. I feel there should be a reasonable allowance for *Max Kaufman's salary,* to be arrived at by *mutual understanding.*

Q. Anything else? A. And the share allocated to the two participants in the corporation. [R. pp. 104-106.]

Q. Did you state to me a moment ago that *this additional capital was not needed for the business but was needed to acquire that property?* A. *That is correct.*

Q. That was what the capital was for? A. In anticipation of the corporation's requirements, *building requirements.*

The Court: *A building to be used for the housing of the business?*

The Witness: *That is right.*

The Court: And was the building in the name of the corporation?

The Witness: Yes. It went into escrow, I think, in November in the name of the corporation even before its actual charter issuance.

Q. By Mr. McCall: Then the property of the business was actually transferred as of April 1st—*inventory was taken at that time?* A. *That is right.*

Q. *And transfer made?* A. *That is right.*

The Court: That was set up at the time for accounting purposes?

The Witness: Accounting purposes, yes.

Q. By Mr. McCall: Well, what about the papers—any papers on the matter—that is, when they were signed? A. The papers? As a matter of fact I believe the papers were signed before that time but Mr. Mellinkoff would be in a position to tell you that. I wasn't present when the papers were signed.

Q. What papers do you mean? A. You said papers.

Q. I mean the papers under which the stock of goods in this store—name and goodwill and whatever else went with it that was transferred to the corporation? A. The stock was issued I think at that time, and we made preliminary notes on it. There was a settlement between the parties as to the respective interests.

Q. Up until that time, however, the store actually was the *sole business of Max Kaufman, wasn't it?* A. *It was the sole business of Max Kaufman* with the understanding, of course, that these other parties were to participate in the profits.

Q. 'Parties participate in the profits'? You mean that they were to acquire that store when the transfer was made. A. *Well, they were to use the profits*

that had been made—that is, their percentage of the profits as a definite asset in their name.

The Court: *Contribution?*

The Witness: Contribution.

Q. By Mr. McCall: On this item of the papers to which you are referring, where you read off the three months' profit was $9,295.47, an item appears of salary, $6,097.30. Does that include the salaries paid to Morris and Joseph Kaufman? A. Yes. . . . [R. pp. 108-110.]

Q. *These two men at that time were drawing salaries instead of shares?* A. *That is right.* [R. p. 110.]

Q. By Mr. McCall: Mr. Asimow, do you know whether or not Max Kaufman drew weekly checks from the business? A. He probably did but they were charged against his drawing account and never charged against the profits of the business.

Q. What do you mean? Do you show on any of these figures his drawing account? A. Well, we have it in the balance sheet, showing his net withdrawals from capital, but *the drawing of a private individual is never charged against the profit of a business.*

Q. You mean the amount that he might have drawn weekly or otherwise would not appear on this statement? A. No, sir, not until it was incorporated and he became an employee of the corporation. Then it became an officer's salary.

Q. Do you know how much he drew during that period? A. He drew out amounts—sometimes he would draw an even amount—sometimes draw $1,000. *It had no relation to the business whatever. He drew what he wanted or needed.*

Q. *Was that true during this three months' period?* A. *Yes. He was still operating in the manner of an individual and drew accordingly, and paid his income tax on his drawings.* Of course, now that it is a corporation he restricts himself to personal payments out of his own personal account. . . . [R. pp. 113-114.]

Q. You don't know whether *Joe Kaufman* was drawing any salary out of the business from January 1st on through or not, do you? A. He drew a salary. I don't know whether it started January 1st, but *I believe he drew a salary starting in February.* Now, I am not certain of the exact date of that, but I do not know he drew a salary in March and probably a good part of February. I am not sure if he drew any in January. I think he was back east at the time. . . . [R. p. 114.]

(44) There is nothing in the testimony of any other witness substantially affecting or varying this testimony of Mr. Asimow. Compare the testimony of Max Kaufman [R. pp. 121-122, 132-133], Joseph Kaufman [R. pp. 135-139] and Morris Kaufman [R. pp. 140-141].

(45) The net effect of this testimony is: The Kaufman brothers in December planned to form a corporation, in which they were to become stockholders in certain percentages; the corporation to provide a building therefor, and then to take over Max Kaufman's existing business, and inaugurate a sausage manufacturing business in connection with it; the project to be financed out of the sale of Joseph Kaufman's business in Chicago, from which he promised to raise "all the money necessary." A building site was selected, and temporarily secured, and Joseph

Kaufman went back to Chicago to raise the balance of the money, Max Kaufman meantime retaining and operating his business as sole owner. When the veteran applied for reemployment, Joseph Kaufman was expected back in about two weeks, and they then expected to incorporate and take over the business. However, he did not return until February 7, 1946, and the remaining finances were not made available until some time later. A charter for the corporation was secured on January 21, 1946, but organization of the company and taking over the business still awaited Joseph and the balance of the money. Until then, no inventory was made, and the accountant *could not* adjust their interests or set up the company's books. On his return, Joseph and Morris were both employed by Max Kaufman in the business; they drawing salaries, but he not, because he still owned the business. On April 1, 1946, an inventory of Max's business was taken in preparation for the transfer to the company. This showed some high valuations, and upon the insistence of Joseph and Morris that their contributions to the capital should be adjusted accordingly, since some of their money had been tied up and the company charter had been secured some time before, an adjustment was made in which they were credited with 30% each of this profit toward their cash contributions.

(46) There was *no evidence* whatever that the Kaufman brothers ever *"agreed to carry on as co-owners a business for profit," i. e., as partners;* and none that they ever, in fact, carried on the business *"as co-owners."* In fact, it is affirmed *by the appellees' own witnesses that the Kaufman brothers never operated as co-owners.* [See

testimony of Asimow, par. 43, *supra,* and R. pp. 102, 104-105, 113-114, 132-133, 138-139.]

(47) A few days after April 1, 1946, the veteran was raised to $55 per week for about ten days or two weeks [R. p. 66], and at the end of that time he earnestly protested his continued employment as "handy boy" at the low rate of pay; and was sent on a paid vacation. [R. pp. 46, 67.] On his return he was "discharged" for complaining, or failing to buy some stock in the company. [R. pp. 68-70.]

C. The Appellee Corporation Is Merely an Incorporated Continuance of Max Kaufman's Business, Under the Same Management; and It Succeeded to Max Kaufman's Reemployment Obligation to the Veteran.

(48) The business is still run by Max Kaufman, as president, who owns 40% of the company's stock. [R. pp. 132-133, 121, 100, 105.] The company merely took over and operated Kaufman's business as a going concern. [R. pp. 104-105, 108-110.]

D. There Is No Substantial Conflict in the Evidence as to Any Material Fact.

(49) The only conflicts in testimony arose on collateral matters; not on any *material facts.* All such collateral conflicts were injected into the case by Max Kaufman. He was contradicted on these points by nearly every witness who took the stand, *his own witnesses included.* These contradictions demonstrate the unreliability of his testimony. Thus—

(a) His testimony that Gimpelson wrangled with his brother Morris Kaufman and threatened to knife him

[R. pp. 123-124, 126-127] was *contradicted by Morris Kaufman himself* [R. pp. 141-142], as well as by the veteran. [R. p. 67.]

(b) His denial that he told the disinterested investigator for Dun & Bradstreet on March 30, 1946, that he was then the *sole owner* of the business [R. p. 131], was directly contradicted by the investigator, testifying from his written report of the conversation made at the time [R. pp. 143-145]; and by evidence *aliunde* it was shown that what Kaufman manifestly stated to the investigator was precise truth, as corroborated by his own accountant. [R. pp. 104-106, 108-110.]

(c) His testimony that the departure of Joe Arou, a salesman, for military service, had something to do with the profit-sharing agreement he made with Gimpelson [R. p. 118] in March, 1942, is contradicted by Kaufman's nephew Harry Silverman, who says that he (Silverman) returned from service and took Arou's place when Arou left for service in *November, 1941* [R. pp. 80, 82-83], four months before the profit-sharing agreement was made. [R. pp. 38, 60, 119.]

(d) To cast gratuitous, vituperous aspersions on Gimpelson's qualifications, experience and character, [R. pp. 126, 128-129], Max Kaufman undertook to repudiate *his own signed letter of recommendation of the veteran given in 1944.* [R. pp. 129-130, 20.]

(e) His testimony that he paid Gimpelson $25 per week in cash, allegedly "out of his own pocket," upon the veteran's return from service [R. p. 123] is not only not otherwise corroborated in any manner, but is flatly and unqualifiedly denied by the veteran. [R. p. 64.]

(50) Kaufman's testimony, even if it had presented any real contradiction of a material fact, could scarcely be said to raise a substantial conflict in the evidence. There was no conflict between and among Gimpelson, Asimow, and Joseph or Morris Kaufman.

E. The District Court Was Possibly Influenced by the Fact That He Considered This Suit a "Family Row."

(51) The District Court was impatient with appellant's efforts to cross-examine Max Kaufman adequately [R. pp. 126-132], since the Court considered the suit a "family row" in which "there is not too much truth coming from the lips of any of the parties." [R. p. 130.] This abruptness was continued during argument of the case. [R. pp. 154-155.] It was not strictly speaking a "family row," since Gimpelson was not related to Joseph or Morris Kaufman, and only distantly to Max Kaufman. (Facts, par. 1, *supra.*) The Kaufmans had no "row" among themselves.

(52) During the trial, the Court urged both sides to compromise their differences [R. pp. 86-90], but their efforts failed. [R. p. 91.] This failure, and the relation-by-marriage between Max Kaufman and the veteran (par. 1, *supra*) may have influenced the Court in deciding the case. [R. pp. 21, 25.] This was unjustified. See 162 F. (2d) 1011.

The foregoing summary covers and cites all the evidence in the case, upon any material or controversial point.

ARGUMENT.

Point I: The Veteran Also "Shared the Profits" With Max Kaufman, but Was No "Partner." He Left a Position "Other Than Temporary" in Kaufman's "Employ," and Made Due "Application for Reemployment" Under the Act. He Did Not Waive His Reemployment Rights, and Was Not Guilty of Laches.

(A) The Veteran's Position as a Manager Sharing the Profits Was That of an "Employee" of Kaufman, and Not that of a "Co-owner" or "Partner"; and Was "Other Than Temporary."

"Co-ownership" is essential to partnership. One not associated as "co-owner" is not a partner, although he shares the profits. *California Civil Code, Secs. 2400, 2401(1, 4d) and 2410; Uniform Partnership Law, Secs. 6, 7, 16.*

A manager sharing the profits as wages holds a "position in the employ" of his employer and is covered by the reemployment povisions. *50 U. S. C. A. App., Sec. 308(b); Williams v. Dodds* (9 C. C. A., No. 11,526, Sept. 22, 1947), affirming *Dodds v. Williams* (D. C., Ariz., 1946), 68 Fed. Supp. 995; *Anderson v. Schouweiler* (D. C., Idaho, 1945), 63 Fed. Supp. 802; *Salter v. Becker Roofing Co.* (D. C., Ala., 1946), 65 Fed. Supp. 633.

The coverage of the Act is to be liberally construed in favor of veterans, not strictly construed against them. *Fishgold v. Sullivan Corp.* (1946), 328 U. S. 275, 285; *Kay v. General Cable Corp.* (3 C. C. A., 1944), 144 F. (2d) 653; *MacMillan v. Montecito Country Club* (D. C., So. Cal., 1946), 65 Fed. Supp. 240; *Lee v. Remington*

Rand, Inc. (D. C., So. Cal., 1946), 68 Fed. Supp. 837; *Karas v. Klein* (D. C., Minn., 1947), 70 Fed. Supp. 469.

This veteran's position, and his profit sharing agreement with Max Kaufman, were "for an indefinite future period," and were "other than temporary" under the Act. See The Facts, pars. 11-15, *supra,* and R. pp. 58-60, 91-93, 119. *50 U. S. C. A. App., Sec. 308(b)(B); Opinions of the Attorney General, Vol. 40, No. 106* (May 30, 1945), modifying *40 Op. A. G., No. 66; Trusteed Funds, Inc., v. Dacey* (1 C. C. A., 1947), 160 F. (2d) 413; *Daniels v. Barfield* (D. C., Pa., 1947), 71 Fed. Supp. 884, 886; *David v. B. & Maine R. Co.* (D. C,. N. H., 1947), 71 Fed. Supp. 342, 345.

(B) The Veteran Was Not Required, in "Applying for Reemployment," to Apply for Any Particular Position, to Be Entitled to Be Restored to His Former "Position, or to a Position of Like Seniority, Status and Pay" Under the Act. Nevertheless, He Did So.

Upon a qualified veteran's making timely "application for reemployment," it becomes his employer's *affirmative duty,* under Section 8(b)(B) of the Selective Training and Service Act, *to "restore" him to certain positions delimited by law, i. e., to his former "position or to a position of like seniority, status and pay."* So any "application for reemployment" is *prima facie* and *per se* an application for restoration campatible with law, *i. e.,* to the position or positions specified in the law. It is immaterial that the veteran does not apply for *a particular job by name. The terms of the law complete the application* if such omission is a defect. The employer is clearly not discharged of his legal duty thereby.

Furthermore, when a veteral has actually applied in time for reemployment, and has been offered an inferior job with an explanation why his former job is not offered, it is unfair and unreasonable to say that he did not make due application for proper restoration. *50 U. S. C. A. App., Sec. 308(b)(B); Handbook—Veterans Assistance Program, Sec. 301.8. Cf. Grasso v. Crowhurst* (3 C. C. A., 1946), 154 F. (2d) 208; *Salter v. Becker Roofing Co., supra; Levine v. Berman* (7 C. C. A., 1947), 161 F. (2d) 386; *David v. Boston & Maine R. Co.* (D. C., N. H., 1947), 71 Fed. Supp. 342.

Gimpelson did apply for his former, or a like, position on December 10, 1945. The conversation of that date, as related by both the veteran and Max Kaufman, demonstrate that *each understood that he was then applying for reemployment, and in his former position, if possible.* The conversation was composed primarily of explanations and excuses by Kaufman as to why it was "impossible" for him to restore him to his former job, and why he was offered a lesser job. See The Facts, par. 22(a-h) and 23, *supra;* and R. pp. 41-49, 65-72, 122-123. *These explanations and excuses speak for themselves as to what the parties had in mind.*

The veteran clearly made all the application necessary under the law on December 10, 1945, to entitle him to proper restoration, whether or not the manager's job was then expressly mentioned.

(C) The Veteran Did Not Waive His Right to Proper Restoration.

Waiver is the voluntary relinquishment of a known right which is at the time available. One cannot waive a right before he is in a position to assert it. *67 C. J. 299, Waiver, Sec. 4.* And, a waiver must be supported by a consideration, or by estoppel *in pais,* pleaded and proved. *67 C. J. 289-314, esp. Waiver, Secs. 1-7, 9-11; Atlantic Coast Line R. Co. v. Bryan* (1909), 109 Va. 523, 65 S. E. 30, 32; *Dougherty v. Thomas* (1933), 313 Pa. 287, 169 Atl. 219, 223; *Decker v. Sexton* (1896), 43 N. Y. S. 167, 171; *Universal Gas Co. v. Cent. Ill. P. S. Co.* (7 C. C. A., 1939), 102 F. (2d) 164, 169; *Aetna L. Ins. Co. v. Kepler* (8 C. C. A., 1941), 116 F. (2d) 1.

The doctrine of waiver is inapplicable here for at least two reasons: (1) The veteran did not "voluntarily relinquish" his right to restoration as manager or a like position. because no such job was ever offered, or made "available," to him. There could be no "voluntary" election on on his part, and consequently no waiver. (2) There is no "consideration" for the alleged waiver, and the appellees' position of refusing him restoration as manager never changed to their prejudice, so there is no "estoppel *in pais*" to support any waiver.

Max Kaufman testified: "I explained to him every bit of it"; and told him "I don't own this any more. It is a corporation." And said to him: "Jack, they are going to allow you only $40 from the business—the business belongs already to the corporation. . . . I want you to be satisfied and then we will build up the new plan. We

will probably be able to give you a job that will fit you better in it." [R. pp. 122-123.] This was a misstatement of fact, and Kaufman knew it. See The Facts, par. 28, *supra,* and R. pp. 143-145. The corporation did not own the business, and Kaufman was the sole owner. See The Facts, pars. 42-46, *supra;* and R. pp. 99-106, 108-110, 113-114, 121-122, 132-133, 135-141.

The appellees' contention is that Kaufman secured two advantages, *by means of this misstatement:* (a) he avoided (*i. e.,* rejected) Gimpelson's application for restoration, and (b) secured his temporary acquiescence in inferior work, thus allegedly effecting a "waiver." But a waiver so induced lacks both mutuality and consideration, being based on a misstatement.

The veteran's version is different. He says he was led to acquiesce in a short delay and to accept inferior interim work, not by Kaufman's self-asserted misrepresentation about the ownership of the business, but by *Kaufman's request* that the veteran do so pending Joseph Kaufman's return "in about two weeks," and his promise that he would be "taken care of" at that time. [R. pp. 41-45, 71-75.] The veteran protested against the inferior work and wages from the first week. See The Facts, par. 22 (d, e, g, h), *supra;* and R. pp. 45-49, 65-72. He was never "taken care of." The promise of a better job was broken and the veteran was fired from the inferior job. See The Facts, par. 22(d, e, f) and 47, *supra.*

Regardless of whether credence be placed in Kaufman's or Gimpelson's version of the conversation, *neither helps Kaufman.* The veteran's action was clearly induced either (1) by Kaufman's misstatement of fact, or (2) by his

broken promise; and the "consideration" was thus either always non-existent, or has failed.

Estoppel, based on delay induced by the party claiming estoppel, cannot be sustained as shown under "laches" below.

(D) The Veteran Was Not Guilty of Laches.

The parties stipulated that the veteran was not guilty of laches in filing suit. [R. p. 77.] Nor was he guilty of laches before that time.

The doctrine of laches is based on estoppel, and the maxim of unclean hands. It is an affirmative, equitable defense. Mere lapse of time does not constitute laches. In addition to lapse of time, the party asserting laches must show that the delay was *not induced by any act of his;* and that, because of the other party's inexcusable delay, *his position has so changed* as to make it inequitable for the other to have relief. *30 Corpus Juris Secundum 531-537, Equity, Sec. 116; 2 Cyc. of Fed. Proc. (1928) 506-514, Sec. 412; 5 Cyc. of Fed. Proc. (2d 1943) 52 et seq., Secs. 1519-1520, 1526, 1527; Smetherham v. Laundry Workers Union* (1941), 44 Cal. App. (2d) 131, 111 P. (2d) 948, 952-953; *Winn v. Shugart* (9 C. C. A., 1940), 112 F. (2d) 617, 623.

As Kaufman induced the veteran's delay, he cannot claim laches or estoppel.

Point II: The Issue of Partnership Vel Non Is Immaterial; Since in Any Event the "Incoming Partners" Were Bound by Max Kaufman's Obligation to the Veteran. Nevertheless, the Kaufman Brothers Never Were Partners, Either Actual or Constructive, Although on April 1, 1946, They Divided Max Kaufman's Profits for Three Months. Until That Date, He Was the Sole Owner of His Meat Business. He Was Immediately Succeeded as Such Owner by the Corporation, in Which His Brothers Were Theretofore Mere Subscribers for Stock. It Was Never "Impossible or Unreasonable" for Him to Properly Restore the Veteran.

(A) The "Partnership," If It Existed, Was Bound by Max Kaufman's Obligation to the Veteran, in the Interval Prior to April 1, 1946.

The Uniform Partnership Law, Sec. 17 *(California Civil Code, Sec. 2411)* provides that "a person admitted as a partner into an existing partnership is liable for *all the obligations*" arising before his admission, "as though he had been a partner when such obligations were incurred"; but that his liability shall be satisfied only out of the partnership property. The same Code defines an *"obligation"* as *"a legal duty,* by which a person is *bound to do* or not to do *a certain thing,"* and that it may arise by operation of law, and be enforced in the manner provided by law. *California Civil Code, Secs. 1427 and 1428.*

Sec. 2411 of the Civil Code of California is applicable when the sole owner of a business takes in a partner, as well as when there is a change in the personnel of an existing partnership. *See Commissioner's Notes to Secs. 17 and 41, U. L. A., Partnership; Note: 45 A. L. R. 1257,*

Sec. II(c); Wine Packing Corp. v. Voss (1940), 37 Cal. App. (2d) 528, 100 P. (2d) 325; *Kennedy & Shaw Lbr. Co. v. Taylor* (1892), 3 Cal. Unrep. Cas. 697, 31 Pac. 1122.

A former employee, absent in military service, is deemed to be on a "furlough or leave of absence." *50 U. S. C. A. App., Sec. 308(c).* He still remains for many purposes, an "employee" of the employer, in contemplation of law. *In re Walker's Estate* (1944), 53 N. Y. S. (2d) 106; *Thompson's Estate* (1925), 213 N. Y. S. 426, 126 Misc. 91; *Hovey v. Grier* (1929), 324 Mo. 634, 23 S. W. (2d) 1058. The necessity of properly reemploying him upon his possible return is a continuing *conditional duty or obligation* of the employer during his absence in the armed forces.

In California, a partnership is not a legal entity separate from the partners composing it. *Jung v. Bowles* (9 C. C. A., 1946), 152 F. (2d) 726; *Stilgenbauer v. U. S.* (9 C. C. A., 1940), 115 F. (2d) 283. The owner of a business who takes in a partner, does not shed his existing obligations or duties by so doing; and, under Civil Code, Sec. 2411, *supra,* the incoming partner becomes bound with him, to the extent of the partnership assets.

Therefore, it is immaterial whether, or when, the Kaufman brothers became "partners," in so far as the veteran's reemployment rights are concerned. The taking in of the two "partners" by Kaufman did not render restoration "impossible or unreasonable" for all "partners" were obligated—if they were "partners," as found by the Court.

(B) The Kaufman Brothers Were Mere Pre-incorporation Subscribers for Stock in a Corporation to Be Formed in Future. They Never Were "Co-owners" or "Partners" in Max Kaufman's business, Either Actual or Constructive, at Any Time.

It is not necessary that a subscription for stock in a corporation be in writing, if a part of the price has been paid. *California Code of Civil Procedure, Sec. 1973a(1); 18 C. J. S. 780, Corporations, Sec. 294(c)(1); Vermont Marble Co. v. Declez Granite Co.* (1902), 135 Cal. 579, 67 Pac. 105; *Note, 14 A. L. R. 394.*

A pre-incorporation stock subscription is valid in California if the proposed corporation is incorporated within 90 days afterward, and an application for a permit to issue the shares subscribed for is made with reasonable diligence after such incorporation, and the permit is issued. *California Corporate Securities Act, Stats. 1917, p. 673 et seq., as amended (Deering's General Laws, Act 3814), Secs. 2(8), 3, 16 and 33.*

Corporate existence begins in California when the articles of incorporation are filed in the office of the Secretary of State. But, the corporation is not then ready for business. If it is a stock corporation, it must issue stock, and this can be done only under a permit from the state corporation commissioner, upon an application filed by its officers, who must first be elected by the directors appointed in the articles. Under such permit, when issued, the company may accept assets constituting its capital, and proceed then to transact business, not before. *Cal. Corp. Securities Act, Secs. 2(8), 3, 16 and 33, supra; Civil Code of California, Secs. 285-293, 308, 326-329; 6-A Cal. Jur. 165-166, Corporations, Secs. 73 and 75.*

No partnership exists between stockholders in a corporation or between them and the directors, *20 Cal. Jur. 699, Partnership, Sec. 17;* and they cannot claim to be partners, *14 C. J. 69, n. 50, Corporation, Sec. 35; 18 C. J. S. 390, n. 28, Corporations, Sec. 11.*

No partnership, either express or implied, exists between the *pre-incorporation subscribers to the stock of a proposed corporation* to be formed to take over a business, although they may have *paid in* the amounts of their subscriptions to the owner of the business and have *shared his profits* therefrom. They do not become "co-owners" or "partners" under such facts. *Drennan v. London Assurance Corp.* (1884), 113 U. S. 51, 57-58, 28 L. Ed. 919, 923; *London Assur. Corp. v. Drennan* (1886), 116 U. S. 461, 469, 29 L. Ed. 689, 690; *Lindley on Partnership* (10th Ed., 1935) 19-21; *20 Cal. Jur. 699, n. 8, 9; Blanchard v. Kaull* (1872), 44 Cal. 440, 451; *Fourchy v. Ellis* (C. C., Vt., 1905), 140 Fed. 149; *Baker v. Bates-Street Shirt Co.* (1 C. C. A., 1925), 6 F. (2d) 854; *Kinney v. Bank of Plymouth* (1931), 213 Iowa 267, 236 N. W. 31.

"Co-ownership," not profit sharing, is the test of partnership. Without co-ownership, or community of interest, no partnership can exist. Co-ownership means the "power of ultimate control" over the business. "To state that partners are co-owners of a business is to state that *they each have* the power of *ultimate control.*" *Commissioner's Note to Sec. 6 of the Uniform Partnership Law* (U.L.A., Partnership, Sec. 6); *Drennan v. London Assurance Corp.*, 113 U. S. 51 and 116 U. S. 469.

Although they may share the profits of a business, persons not associated as co-owners are not partners,

either general or limited, express or implied, *among themselves or as to third persons. Uniform Partnership Law, Secs. 6(1), 7(1) and 16(1-2); California Civil Code, Secs. 2400(1), 2401(1) and 2410 (1-2), 2477, 2478, 2483 and 2486; In re Mission Farms Dairy* (9 C. C. A., 1932), 56 F. (2d) 346; *Kasch v. Commissioner* (5 C. C. A., 1933), 63 F. (2d) 466, cert. den. 290 U. S. 644, 78 L. Ed. 559; *Sugg v. Hopkins* (5 C. C. A., 1926), 11 F. (2d) 517; *Williams v. Wolf* (1 C. C. A., 1924), 297 Fed. 696, cert. den. 44 S. Ct. 638, 265 U. S. 593, 68 L. Ed. 1197; *In re Fechheimer Fishel Co.* (2 C. C. A., 1914), 212 Fed. 357, 367; *Giles v. Vette* (1923), 263 U. S. 553, 559, 44 S. Ct. 157, 159, 68 L. Ed. 441; *Drennen v. London Assurance Co.* and *London Assurance Corp. v. Drennan, supra; Meehan v. Valentine* (1892), 145 U. S. 611, 12 Sup. Ct. 972, 38 L. Ed. 835, and note; *Kersch v. Taber* (1945), 67 Cal. App. (2d) 499, 154 P. (2d) 934; *Moon v. Ervin* (1943), 64 Idaho 464, 133 P. (2d) 933; *Wallace v. Pacific Electric R. Co.* (1930), 105 Cal. App. 664, 288 Pac. 834; *Smith v. Grove* (1942), 47 Cal. App. (2d) 456, 118 P. (2d) 324.

"A partnership is an association of two or more persons to carry on *as co-owners* a business for profit"; and "Persons who are not partners as to each other are *not* partners as to third persons." *Cal. Civil Code, Secs. 2400(1), 2401(1) and 2410,* and cases just above cited.

Therefore, in this case, there was not, and could not, be any such thing as an "unofficial partnership," or an "interim status" resembling a partnership, or "in a sense of partnership," or "in legal effect created a partnership," in the sense in which those expressions were used

by a witness, and the District Court. [R. pp. 21, 104, 109.] There either was, or was not, a general partnership between the Kaufman brothers. As there is no proof that any agreement ever existed between them to "carry on the business as co-owners," *they were never partners.*

The witness Asimow repeatedly said that the Kaufmans were not "co-owners," that it was Max Kaufman's "sole business," run by him "as an individual" continuously to April 1, 1946. There is no proof to the contrary. [See The Facts, Par. 43-46, *supra;* and R. pp. 100-101, 104-106, 109-110, 113-114.]

The Kaufman's were not limited partners, for no articles of limited partnership were ever drafted. *Calif. Civil Code, Secs. 2477, 2478 and 2483.*

Morris and Joseph Kaufman "worked for" Max Kaufman prior to April 1, 1946, and "drew salaries rather than shares." [R. pp. 105, 110.] Max Kaufman, however, drew "what he wanted or needed" and "was still operating in the manner of an individual." [R. p. 113.] This is the appellees' evidence.

There was no "profit sharing," in the "partnership" or "co-ownership" sense. Max Kaufman merely agreed to divide his quarterly profit because of the delay in organizing the company for business, and because of the unexpected size of his inventory on April 1, 1946, and in view of the fact that his brothers funds had been tied up in the reorganization plan. [R. pp. 99-101, 105-106, 109-110.]

Such "profit sharing" comes within the exceptions stated in *Calif. Civil Code, Sec. 2401(2, 4d),* that no inference of partnership arises from profit sharing "as interest on a loan, though the amount of payment varies with the profits of the business." (See *London Assur. Corp. v. Drennan,* and other cases, *supra.*) In no event did such profit sharing evidence "co-ownership," which was essential to "partnership."

(C) Max Kaufman Remained the Sole Owner of His Business Until April 1, and It Was Never "Impossible or Unreasonable" for Him to Restcre the Veteran.

"Unreasonable" means more than inconvenient, undesirable or more expensive. *Kay v. General Cable Corp.* (3 C. C. A., 1944), 144 F. (2d) 653, 655; *Levine v. Berman* (7 C. C. A., 1947), 161 F. (2d) 386; *Van Doren v. Van Doren Laundry Service* (3 C. C. A., 1947), 162 F. (2d) 1007.

As the sole owner of his business, Kaufman could have restored the veteran; and there is no proof that such restoration would have blocked or interrupted the incorporation plan. We may assume it would have been inconvenient, or less desirable to Kaufman, than the plan followed, and that some of the corporation's promoters would have enjoyed some less profit than they did in the next year, out of the reorganization plan. But it was clearly not "impossible."

Nor was it "unreasonable," when the national policy and interest, and the fighting man's hardships, and need for prompt civilian restoration are considered. It was clearly no more of a hardship for the Kaufmans to forego some of their anticipated profits and provide this veteran with proper work for a year, than it was for him to be jerked out of his job and be thrown into the hostilities in the Pacific for three years.

We were all in the war together—or were we?

The Act here invoked was passed to *equalize the hardships* of military service. They were to be "shared generally." *50 U. S. C. A. App. 301(b); Kay v. General Cable Corp., supra.* Not heaped endlessly on the nation's warriors.

That it would have cost the Kaufmans this veteran's proper wage for a year did not make his restoration by them "unreasonable" under the facts here.

Point III: There Was No Outright Sale of Kaufman's Business. The Corporation Is a Mere Rearrangement, Merger and Expansion Thereof. The Company Took Over the Business, Under Kaufman, With No Change in Policies or Business, and With Full Knowledge of the Veteran's Rights: and It Is Bound to as the "Employer" Under the Reemployment Provisions.

This case differs from *McFadden v. Dienelt* (D. C., Calif., 1946), 68 F. Supp. 951, where the business was sold outright to third persons during the veteran's military absence. Here, during the veteran's reemployment year, *after his return,* the employer merely merged his business into a corporation, formed between himself and third persons, all of whom had full knowledge of the veteran's rights.

As partners, all of them would have been obligated to the veteran. See Argument, Point II(A) *supra.* Did the mere fact that they chose to incorporate, rather than become partners, change their obligation to him?

It has been held that mere merger or incorporation do not defeat a veteran's reemployment rights, and that the merged entity is responsible to him. *Trailmobile Co. v Whirls* (6 C. C. A., 1946), 154 F. (2d) 866, and especially cases cited on page 871, reversed on other grounds 331 U. S. 40; *Sullivan v. Milner Hotel Co.* (D. C., Mich., 1946), 66 F. Supp. 607. See also *Brown v. Luster* (9 C. C. A., No. 11544, pending); *Karas v. Klein,* 70 F. Supp. 469. Under the National Labor Relations Act, this corporation would have been recognized as identical with Kaufman, and therefore the "employer" in contemplation of the Act. *N. L. R. B. v. Hearst* (9 C. C. A.), 102 F. (2d) 658, 663; *N. L. R. B. v. Federal Engineering Co.* (6 C. C. A.), 153 F. (2d) 233; *N. L. R. B. v. Adel Clay Products Co.* (8 C. C. A.), 134 F. (2d) 343,

346. It has been recognized that the reemployment provisions are akin to the National Labor Relations Act, in meaning and effect. *Bentubo v. Boston & Maine R. Co.* (1 C. C. A.), 160 F. (2d) 326, 328. If so, the corporation is obligated.

Furthermore, a veteran's reemployment rights cannot be adversely affected by *contracts* between the employer and third persons. *Fishgold v. Sullivan Corp.* (1946), 328 U. S. 275, 285; *Trailmobile Co. v. Whirls* (1947), 331 U. S. 40, 58-59.

The corporate fiction may be disregarded in this case, and the veteran's rights protected by an appropriate order. *N. L. R. B. v. Adel Clay Products Co.,* and other cases cited *supra.*

Point IV: Reemployment of a Veteran Effects a Contract for a Year of Work; and an Employer Who Voluntarily Disenables Himself to Perform His Part of Such Obligation by a Sale of the Business During Such Year, Without Providing for Continued Employment of the Veteran by the Purchaser, May Be Held Liable for a Year of Wages to a Veteran Who Loses His Job as Result Thereof.

Laws which subsist at the time and place of the making of a contract become a part thereof, as though set out therein; and an implied part of every contract of reemployment with a veteran is that he will not be discharged "without cause" for one year. *Northwest Steel R. Mills v. Commission* (9 C. C. A., 1940), 110 F. (2d) 286; *U. S. ex rel. v. Quincy* (1866), 4 Wall. 535, 550; *Farmers & M. Bank v. Fed. Reserve Bank,* 262 U. S. 649, 660; *Industrial Com. v. Aetna L. Ins. Co.* (1918), 64 Colo. 480, 174 Pac. 589, 3 A. L. R. 1336, 1343; *U. S. v. Dietrich* (C. C., Nebr., 1904), 126 Fed. 671, 675; *17 C. J. S. 782-785; 12 Am. Jur. 769-772.*

"Cause for discharge" means some defect on the part of the employee. *Hoyer v. United Dressed Beef Co.* (D. C. Calif., 1946), 67 F. Supp. 730; *Corman Aircraft Corp. v. Weihmiller* (7 C. C. A., 1935), 78 F. (2d) 241, 100 A. L. R. 504; *Development Co. etc. v. King* (2 C. C. A., 1908), 161 Fed. 91, 24 L. R. A. (N. S.) 812; *Leatherberry v. Odell* (C. C., N. C., 1880), 7 Fed. 641.

One wrongfully discharged under such a contract may sue at once for a full year of wages. *Moore v. Illinois Cent. Ry. Co.* (5 C. C. A., 1943), 136 F. (2d) 412, cert. den. 320 U. S. 771, 64 S. Ct. 84, 86 L. ed. 461; *Reutschler v. Mo. Pac. R. Co.* (1934), 126 Nebr. 493, 253 N. W. 694, 95 A. L. R. 1, 9-10, and Note pp. 43-44; *Moore County Carbon Co. v. Whitten* (Tex. Civ. App. 1940), 140 S. W. (2d) 880, 882; *Levine v. Meizel* (1942), 34 N. Y. S. (2d) 561.

The sale of a business is a breach of a contract of employment for a definite term. *39 Corp. Jur. 76, Sec. 69, n. 12; 35 Am. Jur. 467-468, Sec. 32;* Notes: *6 L. R. A.* (N. S.), *63, 6 Ann. Cas. 236; White v. Lumiere North American Co.,* 79 Vt. 206, 64 Atl. 1121, 6 L. R. A. (N. S.), 807; *Gaspar v. United Milk Producers, etc.* (1944), 62 Cal. App. (2d) 546, 144 P. (2d) 867, 871-2.

If the Kaufmans' corporation is not obligated to the veteran, then Max Kaufman individually should be required to respond for the veteran's loss of wages for a year.

Point V: The Finding That the Monies From Kaufman's Two Brothers Trebled the Assets of His Business Is Unsupported by Proof; and if Material, Should Be Set Aside.

There is no proof nor inference to support this finding complained of in Specification of Errors I(6) *supra*. [See Finding VIII, R. p. 24.]

For $26,000, the two brothers acquired a 60% interest in a business which in three months earned $9,295 profits over and above their salaries. Their collective split on this profit would be over $5,550, or $22,200 per annum, a return of 85% a year. Assuming 25% to be a reasonable return, Kaufman's business, as a going concern, would be worth $148,000, based on the $9,250 3-month profit. And, thus for $26,000 his brothers got a 60% interest in the business, which at a $148,000 valuation would be worth $88,800. Apparently, they increased the assets *not more than 16%*, instead of the 200% claimed in this unsupported finding.

Conclusion.

The District Court was moved by what was inaccurately called a "family row," insoluable amicably. The "family," however, is the Kaufman brothers who have no disagreement among themselves. They are simply alligned in unison against a distant relation-by-marriage of one of them.

Even if there be kinship between a veteran and his employer, that is no reason for denying him reemployment rights. *Van Doren v. Van Doren Laundry Service, Inc.* (3 C. C. A., 1947), 162 F. (2d) 1007, 1011. Such

a veteran has nevertheless a right to re-enter his former calling and seek to re-establish himself therein, without humiliating and discriminatory demotion to servile service at the hands of a "kinsman."

The treatment accorded this veteran was surely not that expected from welcoming blood relatives. It was precisely the same as that expected from strangers, moved solely by cynical, calculating self-interest. The Kaufmans never tried to take care of this veteran. Their every effort was to the contrary.

There was enough profit in this business, under the proof, to provide the veteran with an adequate wage, and yet leave a more than ample return on the brothers' investment. The veteran was not selfish; he was willing to cooperate; he took a humiliating job at meagre pay under a promise, never fulfilled, that a proper job would be forthcoming, if he would do so.

By so cooperating, he did himself a double disservice. He wasted four months at unappreciated, scurrilous, underpaid work; and his very indulgence is now seized upon by his "grateful" accommodatee as a basis for claiming "waiver" and "laches."

If liberality is not to be extended by a court to a veteran in such a case, at least straight law should be applied, and not denied.

Timely application for reemployment was made, and there was no partnership. But even if there had been, the partnership would have been obligated to him under the reemployment provisions; and the corporation, as the partnership's successor, would also be obligated under the

Adel Clay Products Co. case, and others cited under Argument, Point III, *supra*. The Court found "a partnership," but failed to carry such finding to its conclusion.

As there was no partnership, Max Kaufman was sole owner, and could, and should, have restored the veteran properly, but refused to do so. The corporation taking over his business later, with full knowledge of his obligation to the veteran, was likewise obligated; or, Kaufman should be held liable for a year's loss of wages.

This case is more complicated than veteran's suits usually are, but Gimpelson did not make it so. All he asked was work and pay, which the Congress promised during his three years at war.

Kaufman alone, or Kaufman and his brothers, could have accorded him proper reinstatement, beyond doubt. That they refused it for their own gain, at his expense, and have reaped and shared among themselves the benefit of the wage he would have made, is also a certainty.

The Congress did not intend that an employer might side-step his reemployment obligation to a veteran for mere financial gain or convenience. That is all that happened here.

We submit that numerous errors were made by the Court below. The case presents some legal points of real difficulty in the application of the reemployment provisions, which should receive careful and deliberate consideration. Viewing the situation as a "family row," the court below based its decision on the mere "form" of application for reemployment and on the existence of an "implied partnership," not on the basic problems of graver import discussed herein. [Cf. R. pp. 146-156, with R. pp. 21-25.]

The veteran made due application for reemployment; there was no partnership; and a full review on the facts is due him. That *some relief* should be granted him is respectfully submitted. The extent thereof depends on answers to some of the questions briefed above. The full relief prayed, against both appellees, is permissible; and is, we submit, equitably proper on the law and facts of this case.

Respectfully submitted,

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APPENDIX.

Abstract of Material Parts of Statutes Involved.

1. **The Selective Training and Service Act of 1940, as Amended, Secs. 8 and 16(b) (50 U. S. C. A. App. Sec. 308 and 316(a).)**

Sec. 8(a)—(Provides for the issuance of certificates of satisfactory completion of service to persons inducted into the armed forces.)

Sec. 8(b)—"In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—" . . .

"(B) If such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;"

Sec. 8(c)—"Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the

employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration."

Sec. 8(d)—(Not applicable.)

Sec. 8(e)—"In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action."

Sec. 16(b)—(Excepts Sec. 8 from the expiration clause, and continues it in effect indefinitely.)

2. **The Service Extension Act of 1941, as Amended (50 U. S. C. A. App. Sec. 357).**

Sec. 7—"Any person who, subsequent to May 1, 1940, and prior to the termination of the authority conferred by section 2 of this joint resolution, shall have entered upon active military or naval service in the land or naval forces of the United States shall be entitled to all the reemployment benefits of section 8 of the Selective Training and Service Act of 1940, as amended." . . .

3. **Uniform Partnership Law, Secs. 6, 7, 16 and 17 (California Civil Code, Sections 2400, 2401, 2410, 2411, 1427 and 1428).**

Sec. 2400. *"Partnership defined.* (1) A partnership is an association of two or more persons to carry on as co-owners a business for profit."

Sec. 2401. *"Rules for determining the existence of a partnership.* In determining whether a partnership exists, these rules shall apply:

"(1) Except as provided by section 2410 persons who are not partners as to each other are not partners as to third persons.

"(2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.

"(3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.

"(4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

"(a) As a debt by installments or otherwise.

"(b) As wages of an employee or rent to a landlord.

"(c) As an annuity to a widow or representative of a deceased partner.

"(d) As interest on a loan, though the amount of payment vary with the profits of the business.

"(e) As the consideration for the sale of the good will of a business or other property by installments or otherwise."

Sec. 2410. *"Partner by estoppel.* (1) When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him to anyone, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made.

"(a) When a partnership liability results, he is liable as though he were an actual member of the partnership.

"(b) When no partnership liability results, he is liable jointly with the other persons, if any, so consenting to the contract or representation as to incur liability, otherwise separately.

"(2) When a person has been thus represented to be a partner in an existing partnership, or with one or more persons not actual partners, he is an agent of the persons consenting to such representation, a partnership act or obligation results; but in all

other cases it is the joint act or obligation of the person acting and the persons consenting to the representation."

Sec. 2411. *"Liability of incoming partner.* A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred, except that this liability shall be satisfied only out of partnership property."

Sec. 1427. *"Obligation, what.* An obligation is a legal duty, by which a person is bound to do or not to do a certain thing."

Sec. 1428. *"(How created and enforced.)* An obligation arises either from:

"One. The contract of the parties; or,

"Two. The operation of law. An obligation arising from operation of law may be enforced in the manner provided by law, or by civil action or proceeding."

4. Limited Partnership Law of California (California Civil Code, Secs. 2477, 2478 and 2483).

Sec. 2477. *"Limited partnership defined: (Liability of limited partners).* A limited partnership is a partnership formed by two or more persons under the provisions of section 2478, having as members one or more general partners and one or more limited partners. The limited partners as such shall not be bound by the obligation of the partnership . . ."

Sec. 2478. *"Formation: (Certificates, execution and filing).* Two or more persons desiring to form a limited partnership shall

"(a) Sign and swear to certificates in duplicate, which shall state

"I. The name of the partnership.

"II. The character of the business.

"III. The location of the principal place of business.

"IV. The name and place of residence of each member; general and limited partners being respectively designated.

"V. The term for which the partnership is to exist.

"VI. The amount of cash and a description of and the agreed value of the other property contributed by each limited partner.

"VII. The additional contributions, if any, agreed to be made by each limited partner and the times at which or events on the happening of which they shall be made.

"VIII. The time, if agreed upon, when the contribution of each limited partner is to be returned.

"IX. The share of the profits or the other compensation by way of income which each limited partner shall receive by reason of his contribution.

"X. The right, if given, of a limited partner to substitute an assignee as contributor in his place, and the terms and conditions of the substitution.

"XI. The right, if given, of the partners to admit additional limited partners.

"XII. The right, if given, of one or more of the limited partners to priority over other limited partners, as to contributions or as to compensation by way of income, and the nature of such priority.

"XIII. The right, if given, of the remaining general partner or partners to continue the business on

the death, retirement or insanity of a general partner, and

"XIV. The right, if given, of a limited partner to demand and receive property other than cash in return for his contribution.

"(b) File one of said certificates in the clerk's office and file the other for record in the office of the recorder of the county in which the principal place of business of the partnership is situated, in a book to be kept for that purpose open to public inspection, and if the partnership has places of business situated in different counties, a copy of the certificate, certified by the recorder in those office it is recorded, must be filed in the clerk's office and recorded in like manner in the office of the recorder in each such county.

"(2) A limited partnership is formed if there has been substantial compliance in good faith with the requirements of paragraph one of this section."

Sec. 2483. "*Limited partner is not liable to creditors.* A limited partner shall not become liable as a general partner, unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business."

5. California Corporation Law (California Civil Code, Secs. 285-293, 308, 326-329).

Secs. 285-289—(Authorize the incorporation and re-incorporation of corporations for any lawful purpose by three or more persons.)

Sec. 290—(Describes the data to be contained in the articles of incorporation, including):

. . . "6. The number of its directors not less than three; the names and addresses of the persons who are appointed to act as the first directors. The number so fixed shall constitute the authorized num-

ber of directors until changed by amendment of the articles or, unless the articles provide otherwise, by a by-law duly adopted by the shareholders."

Sec. 290a-291—(Require approval of the articles of certain corporations; and regulate the name selected for the company.)

Sec. 292—"*Execution and filing of articles.* Each person named therein as a director shall, and any other persons may, sign the articles. All signatures thereto shall be acknowledged before an officer authorized by the laws of the State or Government where the acknowledgment is made to take acknowledgments. Any certificate of acknowledgment taken without the State must be authenticated by the certificate of an officer having the requisite official knowledge of the qualifications of the officer before whom the acknowledgment was made, when taken before any officer other than a notary public or a judge or clerk of a court of record having an official seal.

"If the articles conform to law, the Secretary of State shall file them in his office and shall indorse the date of filing thereon. The corporate existence shall begin upon the filing of the articles and shall continue perpetually, unless otherwise expressly provided by law.

"*Filing of copy.* A copy of the articles certified by the Secretary of State, and bearing the indorsement of the date of filing in his office, shall be filed in the office of the county clerk of the county in which the corporation is to have its principal office."

Sec. 293—(Requires registration of the certified copy of the articles in certain county clerks' offices.)

Sec. 308—"*Officers and committees: (How chosen: One person holding several offices: Exer-*

cise of another officer's powers: Duties: Appointment of executive committee: Delegation of powers.) Every corporation shall have a president, a vice-president, a secretary and a treasurer, who shall be chosen by the board of directors. A corporation may have such other officers as may be deemed expedient, who shall be chosen in such manner and hold their offices for such terms as may be prescribed by the by-laws. Any two or more of such offices, except those of president and secretary, may be held by the same person. Any vice-president, assistant treasurer or assistant secretary, respectively, may exercise any of the powers of the president, the treasurer or the secretary, respectively, as provided in the by-laws or directed by the board of directors, and shall perform such other duties as are imposed upon him by the by-laws or the board of directors.

"The by-laws may provide for the appointment by the board of directors of an executive committee and other committees and may authorize the board to delegate to the executive committee any of the powers and authority of the board in the management of the business and affairs of the corporation, except the power to declare dividends and to adopt, amend or repeal by-laws. The executive committee shall be composed of two or more directors."

Sec. 326. "*Certificate for shares.* All stock corporations must issue certificates for shares, when fully paid, which shall state:

(1) The name of the record holder of the shares represented thereby;" etc. . . .

"Signature. Every certificate for shares issued by a corporation must be signed by the president or a vice-president and the secretary or an assistant secretary, or must be authenticated by facsimilies of the signatures of its president and secretary or by a fac-

simile of the signature of its president and the written signature of its secretary or an assistant secretary. Before it becomes effective every certificate for shares authenticated by a facsimile of a signature must be countersigned by a transfer agent or transfer clerk and must be registered by an incorporated bank or trust company, either domestic or foreign, as registrar of transfers."

Sec. 326(a)-329. (Regulate the issuance of partly paid share certificates, exchange, transfer and adverse claims between various types of share-holders.)

6. California Corporation Securities Act, as Amended (Deering's California General Laws, 1944, Act 3814, Secs. 2(8), 3, 16, 33).

Sec. 2(8)—(Defines "sell" as including "subscription" for a security.)

Sec. 3.—*"Necessity for permit to sell securities: Application: Contents.* No company shall sell any security, except upon a sale for a delinquent assessment against such security made in accordance with the laws of this State, or offer for sale, negotiate for the sale of, or take subscriptions for any security of its own issue until it shall have first applied for and secured from the commissioner a permit authorizing it so to do. Such application shall be in writing, shall be verified as provided in the Code of Civil Procedure for the verification of pleadings, and shall be filed in the office of the commissioner. In such application the applicant shall set forth the following:

"(a) The names, residences, and post-office addresses of its officers.

"(b) The location of its principle office, etc. . . .

"(q) Such additional information concerning the company, its condition and affairs, as the commissioner may require."

Sec. 16.—"*Securities issued or sold illegally void.* Every security issued by any company without a permit of the commissioner authorizing the same then in effect, shall be void, and every security issued by a company with the authorization of the commissioner but which has been sold or issued in nonconformity with the provisions, if any, contained in the permit authorizing the issuances or sale of such security shall be void."

Sec. 33.—"*Subscription to share prior to incorporation.* Neither this act nor any provision hereof shall be deemed to prohibit subscriptions for shares of a domestic or foreign corporation made prior to the incorporation thereof; but such subscription shall be deemed to have been made and accepted upon the condition that such corporation shall be incorporated within ninety days thereafter, and, when incorporated, shall with reasonable diligence apply for and secure from the commission a permit authorizing the issue of the shares so subscribed for, in accordance with such subscriptions; . . ."

7. California Code of Civil Procedure.

Sec. 1973a-1. "A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged, or his agent in that behalf."